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In The Supreme Court of the United States

WANDA C. PARIS
Guardian of Shawn R. Paris
and natural mother of Shawn R. Paris
and
ROBERT B. PARIS
natural father of Shawn R. Paris,

Petitioners,

v.

IRON WORKERS TRUST FUND
LOCAL NO. 5,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the District Court err in granting, and the Fourth Circuit err in affirming, summary judgment to Respondent Iron Workers Trust Fund Local No. 5, on the grounds that the "made whole" rule limiting subrogation did not prevent Respondent, as a health insurer, from asserting subrogation rights as to recovery by and on behalf a person injured in a vehicle accident, of sums obtained through settlement of an action brought by Petitioners against a third party tortfeasor regarding that accident?

2. Should the "made whole" rule be applied to benefit plans or insurance plans governed by ERISA, either as a general rule or within the federal common law of ERISA?

3. If the "made whole" rule is adopted generally as part of the federal common law of ERISA, should the doctrine be applied despite any general language in an ERISA qualified plan establishing subrogation rights?

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, are:

Wanda C. Paris, guardian of Shawn R. Paris, and natural mother of Shawn R. Paris, and

Robert B. Paris natural father of Shawn R. Paris, as Petitioners, and

Iron Workers Trust Fund Local No. 5, as Respondent.

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IN THE SUPREME COURT OF THE UNITED STATES

WANDA C. PARIS
Guardian of Shawn R. Paris
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IRON WORKERS TRUST FUND
LOCAL NO. 5
Respondent,

PETITION FOR WRIT OF CERTIORARI

WANDA C. PARIS and ROBERT B. PARIS, Petitioner, by his attorney request that this Court issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The per curiam opinion of the United States Court of Appeals for the Fourth Circuit, issued April 17, 2000, is not published but can be found at 2000 WL 384036 [Appendix A, App. 1a-7a]. [And see reference at 211 F.3d 1265].

The memorandum opinion of the United States District Court for the District of Maryland, issued April 15, 1999, is not published. [Appendix B, App. 8a-11a].

GROUNDS FOR JURISDICTION

Subject matter jurisdiction in the District Court was invoked under the Employees' Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1101 et seq. The matter was brought to the District Court by a petition for removal

submitted by Respondent, which was not opposed. Accordingly, jurisdiction also was invoked under 28 U.S.C. §1331 and §1446(b).

On April 15, 1999, the District Court granted summary judgment to Respondent. The Order and Judgment entered on that date disposed of all issues before that Court. On April 21, 1999, Petitioners timely appealed to the United States Court of Appeals for the Fourth Circuit. Jurisdiction of the Fourth Circuit was invoked through 28 U.S.C. §1291 and by Federal Rule 56.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Under Supreme Court Rule 13.1 and 13.3, this Petition is filed within 90 days of the Court of Appeals opinion.

STATUTES OR PROVISIONS INVOLVED

29 U.S.C. §1001(a) et seq.
[recitation of pertinent provision is included in Appendix]

STATEMENT OF THE CASE

A. Procedural Background and Description

This matter originally was in the Circuit Court for Anne Arundel County (Maryland) as an action by Wanda C. Paris, guardian of Shawn Robert Paris, and by Wanda C. Paris and Robert B. Paris, parents of Shawn Paris, collectively as Plaintiffs (and collectively Petitioners here), against Andre Brinton Jaecks, Defendant. (Case No: C-96-3325 MT). The action sought recovery on various grounds for serious injuries suffered by Shawn Paris in a motor vehicle accident on or about June 25, 1996. The original Complaint was filed in 1997. An amended complaint was filed on or about May 11, 1998. In August of 1998, the matter was settled for $100,000.

In February of 1999, following this settlement, Plaintiffs filed, in the State Court, a petition for apportionment of the settlement proceeds. This was directed to subrogation interests asserted over those proceeds by various entities, including Iron Workers Trust Fund ("the Fund" or "Respondent"), a health insurer which had made payments to or on behalf of Shawn Paris for treatment of injuries sustained in the accident. Plaintiffs (Petitioners) asserted that the well established "made whole" rule of subrogation prevented subrogation interests from being asserted, because the settlement funds obtained did not "make whole" Shawn Paris, his mother as guardian, or his parents as to the damages they sustained, individually or collectively, or as to the amount of recovery they had sought against Defendant.

Respondent, contending its policy is an ERISA-qualified plan and subject to Federal ERISA jurisdiction, submitted on or about March 3, 1999, a notice of removal to the United States District Court for the District of Maryland. Removal was limited to whether the "made whole" doctrine applied--either generally or as a matter of federal common law of ERISA--to the Fund's subrogation interests, as recited in the petition for apportionment of settlement proceeds (which was attached). The notice of removal stated the petition qualified as a cause of action under ERISA (29 U.S.C. §1132(a)(1)(B)). Removal was not opposed. The case thus was filed in the District Court (No. CA-99-613-S).

After removal, on or about March 15, 1999, Respondent submitted an answer to the petition for apportionment of settlement proceeds, and filed a counterclaim. The answer combined specific denials and affirmative defenses. The counterclaim reasserted the Fund's subrogation interest, maintaining that it has paid

$210,021.26 to or on behalf of Shawn Paris due to injuries sustained in the accident. The Fund stated it was entitled to *the full amount of the settlement figure.*

The District Court (Smalkin, J.), notified counsel by letter of March 15, 1999 that the matter relates solely to issues surrounding the "made whole" doctrine. The Court stated Maryland law does not apply because, given ERISA jurisdiction over the case, the issue is one of federal common law. The Court said it would entertain an appropriate motion by Respondent and directed that such a motion be filed. [App. at 13a-14a].

On March 29, 1999, Petitioners filed an amended petition for apportionment of settlement proceeds, which made cosmetic corrections and renumbered certain paragraphs. [App. 17a-App. 22a]. Also on that date, Petitioners answered the counterclaim.

On April 1, 1999, the Fund submitted its summary judgment motion. Petitioners responded on or about April 14, 1999. On April 15, 1999, acting without a hearing, the District Court granted summary judgment.

The Fourth Circuit issued its Opinion on April 17, 2000. (In the Matter of: Shawn R. Paris, No. 99-1558, unpublished per curiam opinion). It affirmed summary judgment for the Fund.

B. Pertinent Factual Background

1. Accident, Injury, State Action Brought

Shawn R. Paris, born February 3, 1975, a resident of Maryland, was injured in a vehicle accident in Anne Arundel County on or about June 25, 1996. (As described in the Amended Complaint, Mr. Paris was operating his motorcycle on Quarterfield Road and collided with a

vehicle operated by Andre Brinton Jaecks, which was entering the road from a parking lot). He suffered severe, incapacitating injuries. His mother, Wanda Paris, was appointed guardian for him by the Circuit Court on August 28, 1996. Mr. Paris continues to reside with his parents.

Mr. Paris' medical expenses were covered, in substantial part, by an employee benefit plan, the Iron Workers Trust Fund. Petitioners do not dispute that this plan is an ERISA-qualified plan (see 29 U.S.C. §1002(21)).

However, it cannot be disputed that Mr. Paris' injuries are severe, that he has been rendered mentally and physically disabled, and that he is not expected to support himself, earn a living, go to school, or take care of his daily needs. His condition since the accident has not materially improved.

As noted, in 1997 an action was brought by Wanda Paris, as guardian and on behalf of her son, against the third party motorist (Mr. Jaecks). Robert B. Paris, Shawn Paris' father (and Wanda Paris' husband), joined in his capacity. The claims included claims on behalf of Shawn Paris, on behalf of Wanda Paris as guardian, and by Wanda and Robert Paris as to their duties as parents of a disabled adult child (see Md. *Family Law* Code Ann., §13-102, §13-103). An Amended Complaint was filed in May, 1998. *Notably, the Amended Complaint does not make a claim for recovery of past or future medical expenses.* It was directed solely to the claims asserted, including a claim under the *Family Law* Article. [App. 22a-App. 28a].

2. Settlement of Action Against Third Party, Petition for Apportionment of Proceeds, Removal to U.S. District Court

In August of 1998, the action was settled for

$100,000, the limit of existing insurance coverage for the defendant driver (Mr. Jaecks). A release was executed on August 18, 1998, less or subject to appropriate deductions for attorney fees and costs. Subsequently, the Parises sought apportionment of these proceeds. They maintained that the "made whole" rule *prevents* various entities claiming these proceeds, including Respondent, from asserting a subrogation claim, because none of the Plaintiffs has been "made whole" as to their respective claims by the $100,000 settlement, given the circumstances and the injuries sustained. Therefore, the $100,000 settlement, less attorney fees and costs, must be retained on behalf of Shawn Paris "to be devoted to compensation for his injuries and pain and suffering."

3. Summary Judgment, District Court's Opinion

After removal to the District Court, and upon directive by the Court, the Fund submitted an extensive summary judgment motion. The motion maintained that general approach of ERISA regarding insurance plans should apply, the subrogation language in the Plan and in other related documents was clear, and that the "made whole" rule is merely a "gap filler" rule which does not apply if policy language plainly and completely describes subrogation interests. The motion contended that other Federal courts have declined to apply the rule or have found it overcome by policy language, and thus it does not prevent subrogation.

The Fund contended its subrogation language entitles it to "first and full dollar" recovery of any sums obtained by an injured person from a third party by any action related to covered injuries, to the full extent of the medical expenses covered or advanced by the Fund. It further stated Wanda Paris signed an assignment and subrogation agreement, confirming these interests.

The Fund's Plan provides, as to subrogation, that any person included in the Plan who recovers damages from a third party for covered injuries "must reimburse the Plan for the payments it has made in connection with your injury." The Plan states, as an example, that if it extended $5,000 in medical payments and the covered person obtained "any money" in an action against a third party related to the injuries, the Plan "would be entitled to receive up to $5,000 of that money as reimbursement for the benefits" it provided to the employee. A similar statement is made in the "Subrogation Notice." Also, a "Subrogation of Third Party" amendment to the Plan states that once the liability of any responsible third party is resolved, the covered person is required "to reimburse the Fund up to the full amount of the recovery for the full amount of loss of time benefits and/or medical benefits received." Acceptance of benefits by a covered person "constitutes an agreement by the injured person to reimburse the Fund for benefits paid up to the full amount of the recovery due to the injury or illness." If reimbursement is not made from sums recovered from a third party, the Fund may bring an action against the covered person. An Acknowledgement Form contains similar language.

Any recovery from a third party is an asset for the Fund "and will be applied first to reimburse the Fund." Any sums in excess of that necessary to reimburse the Fund in full "may be retained by the Claimant as his sole property." As indicated, the Fund supplied documentation to the effect that it made payments of $210,021.26. (More than twice the $100,000 settlement.)

Petitioners, in their reply to the summary judgment motion, maintained that the Fund's subrogation language must give way to the interests and policies of the "made whole" rule. Petitioners stated Federal courts have

recognized and applied the rule as a matter of the federal common law of ERISA. Petitioners contended that the Fund's subrogation language noted does not *specifically* refer to and *expressly* override the "made whole" rule. Petitioners noted that if subrogation provisions invoked by the Fund are applied, it would obtain *all* of the reimbursement it seeks from the net settlement figure, leaving Shawn Paris, his guardian, and his parents, with no recovery whatever from the amount obtained in their action against the negligent motorist. This, Petitioners stated, would be a manifest injustice.

Almost immediately after receiving Petitioners' response to the Fund's summary judgment motion, the District Court (Smalkin, J.), granted the motion. In its Memorandum Opinion, the District Court stated that the "made whole" issue "is a matter of federal law completely preempted by ERISA, rather than governed by state law." The Court said the majority of Federal cases which have dealt with the issue "hold that even a 'boilerplate' subrogation clause can override the 'make whole' doctrine because the 'make whole doctrine' is only an equitable gap-filler." [App. at 9a]. The Court continued, "Even in Circuits taking a generally pro-beneficiary position, an ERISA plan with language specifically allowing the plan 'first reimbursement' is held to override the 'make whole doctrine.'" [App. at 9a].

The District Court observed that the Fourth Circuit has not (at that time) spoken to this issue. However, given the District Court's view of the "weight of authority" among Federal courts on the question, it found that "the plan language at issue here absolutely rules out any application of the 'make whole doctrine.'" The Court added: "Based on the clear and unequivocal language of the plan at issue here, there is absolutely no question that the petition in this case

must be denied. To the extent that the petitioner's opposition memorandum can be read to suggest the plan documents must mention the 'make whole doctrine' *in haec verba*, the Court rejects such contention as unsupported by authority and unsound." [App. at 10a].

The Court further stated that the Fund language does not permit deduction for attorney fees from the reimbursement sought as to the net settlement proceeds. Thus, concluding the "made whole" doctrine either does not apply or is overcome by the plan language involved, the Court determined that the Fund is entitled to the *full amount* of its reimbursement claim.

4. Fourth Circuit Opinion

In its Opinion (unpublished although the issue was one of first impression), the Fourth Circuit rejected any contention that the "made whole" doctrine can be incorporated in the federal common law of ERISA, referring to a prior Fourth Circuit decision dealing generally with ERISA and federal common law, *United McGill Corp. v. Stinnett*, 154 F.3d 168 (4th Cir. 1998). The Court said [App. 5a]:

> As a federal matter, our decision in *United McGill*, *supra*, prevents us from resorting to federal common law in this case, let alone adopting the make-whole doctrine as a new federal common-law principle for ERISA cases. As [Petitioners] conceded in oral argument, the subrogation provision in the Fund's Plan is plain and clear. It entitles the Fund to reimbursement of the full amount of [Petitioners'] recovery. We must enforce this unambiguous provision in accordance with its plain language and literal meaning, and it would therefore be inappropriate for us to override the provision by grafting onto it the make-whole doctrine.

The Fourth Circuit continued, rejecting the make-whole rule

[App. 5a]:

> In reviewing the Plan, we have kept in mind that contracts subject to the provisions of ERISA are very different from ordinary insurance contracts and are not subject to the same rules of construction. ERISA requires that drafters of plans use clear, ordinary language that is readily understandable by laypersons, whereas ordinary insurance contracts contain more particular and precise language, as well as confusing legalese and boilerplate. Applying the same doctrines and rules of construction to ERISA contracts that generally apply to insurance contracts, such as the made-whole doctrine or the rule requiring courts to construe insurance contracts strictly against their drafters, would frustrate the purposes of ERISA. As the Fifth Circuit stated in *Sunbeam-Oster Co. v. Whitehurst*, 102 F.3d 1368 (5th Cir. 1996): '[W]e should not (and will not) penalize [ERISA plans] for lack of technical precision or verbosity by labeling the Plan "silent" or "ambiguous" when it uses the kind of direct, jargon-free language that is mandated by ERISA for all summary plan descriptions... .' 102 F.32d at 1375.

The Court found that the Plan established its subrogation rights. It added, "self-funded ERISA plans generally have very limited resources that they must use for the benefit of all their participants. Subrogation is an extremely important tool for maintaining the financial viability of such plans."

The Fourth Circuit further stated that its decision not to adopt the made whole doctrine as a matter of federal common law under ERISA "comports with the weight of authority addressing the issue." [App. 6a]. The Court recognized there are contrary decisions from the Ninth Circuit and Eleventh Circuit, but declined to follow or distinguished those decisions. Thus, Fourth Circuit declined

to follow Eleventh Circuit decisions holding that the make-whole doctrine is a "default rule" in ERISA cases, unless the plan at issue *expressly excludes* the doctrine. See *Cagle v. Bruner*, 112 F.3d 1510 (11th Cir. 1997). The Fourth Circuit said, "Such a rule would frustrate the purposes of ERISA by requiring plan drafters to inject legalese into plans rather than use clear, ordinary language explaining the plan's provisions. Laypersons generally would not understand a reference to the make-whole doctrine."

The Fourth Circuit recognized the inherent injustice in its approach but said it was powerless under ERISA to adopt any other course. "We must enforce the plain language of an ERISA plan that does not conflict with any of ERISA's provisions. Therefore, while we are aware of the possible hardships when an accident victim must reimburse a plan even when not made whole, [Petitioners'] proper recourse is to Congress, not the courts." The District Court thus was affirmed.

REASONS FOR GRANTING WRIT

THE "MADE WHOLE" RULE AS TO SUBROGATION PRECLUDES RESPONDENT'S SUBROGATION CLAIM, AND THE RULE SHOULD BE MADE PART OF THE FEDERAL COMMON LAW OF ERISA

This is a prime issue for review by this Court. This Court has not yet directly spoken to whether Federal courts may adopt and apply an essential subrogation rule such as the "made whole" rule, as a matter of federal common law under ERISA. It is a continuing issue which has been developing in Federal courts for some years and is a matter of sharp and notable division among the Circuits. A primary purpose of this Court's certiorari jurisdiction is to ensure uniformity among the Courts of Appeals, particularly on an issue of federal law. *See, e.g., Arco Corp v. Aero Lodge*

735, 390 U.S. 557 (1968), and *Northwestern National Bank v. United States*, 387 U.S. 213 (1967). The Fourth Circuit, in a decision it unfortunately chose not to publish, has joined the so-called "weight of authority" rejecting the rule, yet recognizing the plainly inequitable results of that approach.

The Fourth Circuit maintains that the remedy for such inequity rests with Congress. Petitioners respectfully disagree. The made whole rule is an equitable rule of subrogation, which in itself is an equitable doctrine. Development and application of such rules historically have been the province of the courts. Development of the federal common law of ERISA clearly has been a matter of federal court opinion and interpretation. Without question, this issue is properly directed to the federal judiciary rather than to Congress and thus, ultimately, to this Court.

A. The "Made Whole" Rule and Subrogation

The "made whole" rule states that subrogation, as an equitable doctrine, must be viewed in light of the nature of the recovery from a third party obtained by a person who has received certain benefits through an insurer. *That is, if the recovery does not "make whole" the person for the injuries sustained, a "first and full dollar" reimbursement or subrogation should not be imposed.* The subrogation interest at issue cannot be recognized, or it must be recognized proportionately.

The "made whole" rule is a well established equitable rule of subrogation. As noted generally in 16 *Couch on Insurance* 2d §61:20, "The doctrine of subrogation in insurance does not arise from, nor is it dependent upon, statute or custom or any of the terms of the contract; it has its origin in general principles of equity and in the nature of the insurance contract as one of indemnity." The right of subrogation "rests not upon a

contract, but upon the principles of natural justice." Further, as the Section continues, the principle of subrogation "will be applied or not, according to the dictates of equity and good conscience, and to considerations of public policy, resting, as it does, upon the maxim that no one should be enriched by another's loss."

The Section adds that subrogation "is not a matter of right, nor does it necessarily rest on a contract, but is purely equitable in its nature, and will not be enforced when it would work injustice to the rights of those having equal equities." Thus, "Equity will require that the insured be made whole before the insurer's right to subrogation will arise." For State cases on the rule or subrogation, see generally, *Annotation*, 73 A.L.R.3d 1140, "Right of 'Blue Cross' or 'Blue Shield' or Similar Hospital or Medical Service Organization, To Be Subrogated to Certificate Holder's Claims Against Tortfeasor."

A detailed review of subrogation and equitable interests, including the "made whole" doctrine, can be found in Greenblatt, *Insurance and Subrogation: When the Pie Isn't Big Enough, Who Eats Last?*, 64 Univ. Ch.L.Rev. 1337 (1997). The article considers the subject from the perspective of "risk allocation" rather than as a doctrinal issue, suggesting that even if the made whole rule were universally applied despite subrogation language in an insurance contract (as is the approach of many State jurisdictions), the result would not be disastrous for insurers, since through rate setting and other asset allocation schemes, insurers can adapt to the economic effects of the rule. The article does not suggest dispensing with the made whole rule.

In this regard, the present circumstances must be kept in mind, since they represents a classic situation for

applying the made whole doctrine. It must be conceded by the Fund that the $100,000 recovery does not "make whole" Shawn Paris, his guardian, or his parents for their various claims or for the injuries sustained by Shawn Paris. Indeed, the $100,000 recovery does not approximate the medical expenses paid by the Fund. It must be conceded that Shawn Paris' injuries and their long-term results are severe, disabling, and permanent. Having suffered permanent brain injuries, the impact of these injuries is that he cannot handle daily chores, go to school, or care for himself.

The Fund is seeking repayment of sums it has paid so far on Shawn's behalf. But the Fund feigns ignorance of the fact, and expects the courts to overlook the fact, that asserting its full subrogation interest over the entire settlement proceeds will leave Shawn Paris and his family with not a dime from those proceeds as they seek to find ways to care for Shawn.

In addition, under the Amended Complaint, the Parises *did not make a claim* for past or future medical expenses. Their claims concerned the claims arising from the accident. Thus, the subrogation interest here is attenuated at best, assuming it can be applied over any and all recovery when the claims through which recovery was obtained did not include a demand for past or future medical expenses. Further, it cannot be disputed that, although the subrogation provisions here are extensive, they do not contain *any* express reference to the "make whole" doctrine.

B. ERISA, Federal Courts, and the "Made Whole" Rule

Review by this Court of this matter is warranted due not only to the core interests at stake, but also given the conflict between the Circuits in applying this rule, including

whether it is within the federal common law of ERISA. The proper and more reasoned approach is to adopt the made whole rule.

The Eleventh Circuit, in *Guy v. Southeastern Iron Workers' Welfare Fund*, 877 F.2d 37 (11th Cir. 1989), determined in an ERISA context that the "make whole" rule can be considered as a matter of federal common law of ERISA. That situation, as here, involved injuries sustained in a vehicle accident, payment by a benefit plan of more than $74,000 in medical expenses, and recovery by the injured party against the negligent third party. (However, the recovery was substantial, amounting to a $500,000 payment plus an annuity of $2.13 million). The ERISA benefits plan denied further benefits due to its subrogation claim, which it asserted under detailed subrogation provisions in the plan similar to the provisions here.

The *Guy* court found that the plan administrators arbitrarily denied further benefits pending resolution of the subrogation dispute, since resolution of the issue in favor of the benefit plan was "uncertain." The court stated, "It is a general principle of subrogation law that an insured who has settled with a third-party tortfeasor is liable to the insurer-subrogee only for the *excess* recovered over the total amount of his loss." Citing 16 *Couch on Insurance* 2d §60.50. The injured party has not been made whole from his portion of the settlement and thus "the Fund's right to subrogation was not mature." *Guy* thus considered this "general principle" as part of its authority under ERISA to review and apply provisions of ERISA-qualified plans. The "made whole" doctrine was made part of the court's discussion under the federal common law of ERISA and was applied to the insurance policy at issue.

The "make whole" doctrine also was considered by

the Eleventh Circuit in *Cagle v. Bruner*, 112 F.3d 1510 (11th Cir. 1997), a decision noted and rejected by the Fourth Circuit here, and involving subrogation rights claimed by an employee benefit plan for payments made regarding injuries sustained in a car accident. The Court reviewed subrogation agreement language contained in the insurance or employee benefit plan.

As to subrogation and the made whole rule, the court stated the rule "is part of the common law of this circuit" (citing *Guy*), even if the court was not bound by doctrines of state insurance law. Turning to the "made whole" rule, the *Cagle* court observed that "State courts generally treat the made whole doctrine as a default rule that is read into insurance contracts, except where it is explicitly excluded." 112 F.3d at 1520-1521, noting *Fields v. Farmers Insurance Co.*, 18 F.3d 831 (10th Cir. 1994). And see other cases cited, such as *Cutting v. Jerome Foods, Inc.*, 993 F.2d 1293 (7th Cir. 1993), *cert.den.*, 510 U.S. 916, which concluded that "the make whole doctrine is a default rule in ERISA cases" and is a "gap filler" available only when the policy is "silent" on the issue. However, even *Cutting* observed that the made whole rule *can* apply if the insured, after paying back benefits through sums obtained from a third party, is left with "an uncompensated injury." Also, *Cutting* decided not to make a determination of the made whole doctrine, *deciding that because the rule is a default rule of interpretation*, the plan did not act unreasonably in disclaiming the principle.

The Seventh Circuit more recently generally reviewed the issue in *Wal-Mart Stores, Inc. Associates' Health and Welfare Plan v. Wells*, 2000 WL 631028 (7th Cir. 2000). The Court noted that since ERISA plans retain their essential character as contracts, they are enacted "against a background of common-sense understandings and

legal principles that the parties may not have bothered to incorporate expressly but that operate as default rules to govern in the absence of a clear expression of the parties' intent that they not govern." This principle "has been applied to the interpretation of ERISA plans in a number of cases in this and other courts." Citing, e.g., *Cutting*. The *Wal-Mart* court indicated that permitting full subrogation rights would allow the ERISA plan a "free ride" on the efforts of the participants' attorney and would "gratuitously deter the exercise of the tort rights of plan participants." The court remarked that the participant "would have been surprised to have been told when she signed onto this plan that as a result of it she might not be able to obtain compensation for tortiously inflicted property damage." However, the *Wal-Mart* court declined to definitely decide the applicability of the "made whole" doctrine.

As suggested in *Cagle*, because the "made whole" rule is often viewed as a "default" rule, the parties can "contract out" of the rule by precise description in an insurance policy or employee benefit plan of subrogation rights. However, the court rejected the contention that this occurred in the subrogation provisions of the plan before it. *The court stated the "standard subrogation language" of the plan before it was not sufficient to permit a finding that the parties had specifically excepted the effect of the make whole doctrine.* (Citing *Barnes v. Independent Auto Dealers Association*, 64 F.3d 1389 (9th Cir. 1995), at 1394, see *infra*). An ERISA plan "overrides the make whole doctrine only if it includes language 'specifically allow[ing] the Plan the right of first reimbursement out of any recovery [the participant] was able to obtain even if [the participant] were not made whole.'"

Further commenting on the contention that discretionary authority allowed to plan administrators allows

the administrators to interpret the plan in favor of its subrogation rights and to reject the made whole rule, the *Cagle* court remarked:

> We recognize that in *Cutting* [*supra*], the Seventh Circuit held that where a plan did not specifically accept or reject the make whole doctrine, and the administrator had discretionary authority to interpret ambiguous language in the plan, it was not arbitrary for the administrator to conclude that the plan did not incorporate the make whole doctrine. 993 F.2d at 1299. We decline to follow *Cutting*. In our *Guy* decision, we concluded that the make whole doctrine was applicable to a subrogation dispute even though the administrators of the plan had discretion to interpret the plan, and the administrators claimed the make whole doctrine was inapplicable. See 877 F.2d at 39-40.

The *Cagle* court continued, as to the equities involved:

> We believe *Guy* reached the right result. As we explained above, the make whole doctrine exists because parties to an insurance contract do not always explicitly address what happens when the insurer pays less than the insured's total loss, and the insured achieves a recovery from a third party. The effect of the doctrine is to imply into ambiguous insurance contracts (including ERISA plans) a default provision governing that situation. Either the make whole doctrine is implied into the plan (the default scenario) or it is not (if there is clear language rejecting it). There is no interpretive question for the Fund to consider.

The *Cagle* court further stated, on the question of plan administrator discretion, "We do not believe that ERISA gives the Fund that kind of authority, which is denied to insurance companies not governed by ERISA." Further, the Fund can avoid the default rule by including in its plan language a provision *explicitly* providing the plan

with a right to first recovery, "even when a participant or beneficiary is not made whole." Because language this explicit did not appear in the plan before the court, "the make whole doctrine applies to this case."

In *Barnes, supra*, 64 F.3d 1389 (9th Cir. 1995), the Ninth Circuit considered the made-whole doctrine in an ERISA context, in an auto accident situation (occurring in California). The *Barnes* court stated ERISA precludes application of state common law rules to self-funded employee benefit plans (a conclusion, however, contrary to *Cagle* and *Fields*). Nevertheless, *Barnes* found that the nature of the subrogation interests allowed application of a similar doctrine. That is, the make-whole rule, even if not a strict matter of State law, "is supported by substantial authority in existing insurance law, and it is consistent with ERISA's purpose of protecting participants in employee benefit plans." It added, "Because the make-whole rule does not permit an insured to recover from the tort-feasor and from her insurance company if the recovery would exceed the damages, it also is consistent with ERISA's related purpose of maintaining the interest of other employees in their benefit plans."

Thus, *Barnes* stated "We adopt as federal common law this generally accepted rule that, in the absence of a clear contract provision to the contrary, an insured *must be made whole before an insurer can enforce its rights to subrogation*." [Emphasis supplied]. The court went on to conclude that the injured party was not "made whole" by the recovery obtained.

In *Marshall v. Employers Health Insurance Co.*, 1997 WL 809997 (6th Cir. 1997) [unpublished] (affirming 927 F.Supp. 1068 (M.D.Tenn. 1996)), the Sixth Circuit adopted the made whole rule in its review of ERISA plans.

It stated, "We adopt the made whole rule as a default rule in this circuit. Such a rule is consistent with the equitable principle that [an] insurer does not have a right of subrogation until the insured has been fully compensated, unless this agreement itself provides to the contrary." However, as a default rule, definitive subrogation language in a plan can override the effect of the rule.

And in *Hartenbower v. Electrical Specialties Co. Health Benefit Plan*, 977 F.Supp. 875 (N.D. Ill. 1997), involving a pedestrian accident, the court considered subrogation clauses of the policy at issue. Noting *Barnes*, the court stated it is a "general equitable principle" of insurance law that "absent agreement to the contrary, an insurance company may not enforce a right to subrogation until the insured has been fully compensated for her injuries, that is, has been made whole." The court discussed application of the make-whole rule as a matter of federal common law in interpreting ERISA and plans covered by ERISA.

Similarly, the court decided that, to preclude application of the make-whole doctrine, the plan at issue *must specifically address it*. The court stated, "Employees should unequivocally know if their plan disallows application of the make-whole rule. ... Plans should give employees plain information regarding the administration of their plans." Thus, although ERISA does not require that an employee welfare plan follow the make-whole doctrine, "it should plainly state any intention not to do so."

Finding that the plan before it "*has not explicitly disallowed the make-whole doctrine*" the court stated that the doctrine could be applied. [Emphasis supplied]. The injured party is entitled to be made whole and the plan "is liable as an excess carrier for any medical or hospital payments not covered by insurance or indemnification." The court went on to discuss other issues involving ERISA and subrogation.

Despite the extensiveness of the subrogation provisions in Respondent's plan, there is no express reference to the "make whole" rule. Nor is there any statement that the Fund is entitled to first and full dollar reimbursement from any sum recovered by the covered person in any action against a third party for the injuries involved, *even if* such recovery does not make the covered person "whole." Petitioners therefore dispute that the Fund's subrogation language constitutes an "explicit rejection" of the make whole rule, and dispute the Fourth Circuit's view that general subrogation language can eliminate the effect of the rule.

Petitioners further dispute the Fund's contention, which the District Court followed and which was noted by the Fourth Circuit, that the "weight of authority" is to the contrary. The Fund and the Fourth Circuit [see Opinion at 6, App. 6a], cited decisions declining to apply the "make whole" rule from: the Fifth Circuit, *Sunbeam-Oster Co., Inc. v. Whitehurst*, 102 F.3d 1368 (5th Cir. 1996); the Seventh Circuit, *Cutting, supra* (yet that decision can be read as leaving the question open or as viewing the rule as a default rule), and the Eighth Circuit, *Waller v. Hormel Foods Corp.*, 120 F.3d 138 (8th Cir. 1997), along with two District Court decisions, *Harris v. Harvard Pilgrim Health Care, Inc.*, 20 F.Supp.2d 143 (D.Mass. 1998), and *Great-West Life & Annuity Insurance Co. v. Barnhart*, 19 F.Supp. 2d 584 (N.D. W.Va. 1998). And see *Ryan v. Federal Express Corp.*, 78 F.3d 123 (3rd Cir. 1996), indicating that the Third Circuit has declined to apply the "made whole" rule in ERISA cases.

However, these decisions do not constitute the "weight of authority" on this issue. They represent only that the Third Circuit, the Fifth Circuit, possibly the Seventh Circuit, and the Eighth Circuit do not adopt the made whole

rule as a matter of federal common law of ERISA. To that group of decisions now must be added the Fourth Circuit--given its present decision.

Yet, in light of *Guy* and *Cagle* (Eleventh Circuit), *Barnes* (Ninth Circuit), *Marshall* (Sixth Circuit), District Court decisions such as *Hartenbower* and *Marshall*, and a fair reading of *Cutting* (Seventh Circuit) by which that Court does not expressly reject the made whole rule, it cannot be said that the weight of authority in the Federal courts is against adoption of the made whole rule. In addition, in a series of recently issued decisions by the United States District Courts in Ohio, following the Sixth Circuit decision in *Marshall*, the "made whole" doctrine was specifically affirmed and applied in ERISA matters. See *Copeland Oaks v. Haupt*, 41 F.Supp.2d 747 (N.D.Oh. 1999) (ERISA plan's subrogation is subject to made whole rule if plan is "silent or ambiguous" on issue); *Community Insurance Co. v. Ohayon*, 73 F.Supp.2d 862 (N.D.Oh. 1999) (damages received by insured from third party for injuries sustained in accident did not fully compensate insured for injuries, given circumstances, and insured was not required to reimburse insurer from amount recovered, under reimbursement language of ERISA medical plan); *Hiney Printing Company v. Brantner*, 75 F.Supp.2d 767 (N.D.Oh. 1999) (made whole rule is "interpretative guide" which "construes ambiguities against" drafter of ambiguous language, and thus rule applies when ERISA plan is "silent" on issue), and *Sherbin v. Fortis Benefits Insurance Company*, 79 F.Supp.2d 864 (N.D. Oh. 2000) (made whole rule can be applied in ERISA cases, if ERISA plan fails to specify extent of reimbursement or subrogation right, including whether right supersedes insured's right to be made whole, if plan is ambiguous, rule applies).

Thus, numerous federal courts consistently have

applied the made whole rule in ERISA matters, utilizing various approaches. Rather than the "weight of authority" being against application of the rule in ERISA situations, it can be said, especially as to review by this Court, that the matter is the subject of considerable division among the Federal Circuits.

C. General Equitable and Policy Considerations

In addition, even by a strict contract analysis, a party to a contract should be informed of the true nature and scope of the contract language. If a doctrine as well established as the "make whole" rule is to be abrogated by contract, that should be plainly stated. Given, particularly, that insurance contracts are hardly subject to negotiation (this is even more true in health insurance contracts applying to entire classes of participants), great care should be taken to ensure that the party drafting the contract, in this case a health insurer, specifically inform participants to the contract of what rights and avenues of recourse are precluded.

Such a position certainly goes farther than the District Court and the Fourth Circuit were willing to go here. Yet Petitioners maintain that if such a rule were adopted and even if *specific* language muting the effect of the made whole rule is included in all ERISA insurance and health care plans, the "make whole" rule *still should be considered as a proportionate means of dividing proceeds in similar circumstances*. That is, policy language specifically enforcing subrogation interests despite the "make whole" rule should *not* preclude court subrogation review, but would permit an insurer to advance that interest *in proportion to other interests directed at recovery proceeds*, including the interest and claims of the injured party. Any other approach would, again, allow insurers merely to insert certain language in a contract which is

never subject to negotiation and thus eliminate, at the stroke of a pen, a well established equitable rule and make subrogation merely a cost-recovery vehicle for insurers, rather than a doctrine subject to judicial oversight.

With regard to equitable interests, a detailed consideration of the interests and equities addressed by the "make whole" doctrine was undertaken by one of the many State cases applying the rule, *Shelter Insurance Companies v. Frohlich*, 243 Neb. 111, 498 N.W.2d 74 (1993). The court concluded that in absence of a valid contractual provision or statute to the contrary, an insurer may exercise a subrogation interest *only when the insured has obtained an amount that exceeds the insured's own loss*. The settlement in the auto accident claim was $212,500, and medical expenses paid by one insurer amounted to $10,000 (total medical costs were $50,000). The trial court determined the insurer should be paid its $10,000. This finding was reversed.

The *Frohlich* court noted general principles of subrogation, stating that "subrogation is unavailable until the debt owed to a subrogor has been paid in full." [citations omitted]. Unless a contract provides otherwise, equitable principles apply "even when a subrogation is based on contract." [Citations omitted]. If the contract "is merely the usual equitable right which would have existed in any event in the absence of a contract, equitable principles control subrogation." Subrogation involves principles that 1) an insured should not recover twice for the same loss (such as from the insured's insurer and the tortfeasor), and 2) a wrongdoer should reimburse an insurer for payments that the insurer has made to the insured.

The *Frohlich* court further stated, discussing the made whole rule, and citing numerous cases:

> ...nearly every appellate court that has considered the question has recognized that unless an insurance policy contains a provision to the contrary, an insurer's right to recover under a subrogation clause of an insurance policy requires that the insured must have been fully compensated for the loss covered by that policy.

As to the practical issues before it, the *Frohlich* court said, considering whether a subrogation claim should be permitted to fully absorb recovery obtained by the injured party:

> Allowing an insurer to subrogate against an insured's settlement when an insured has not been fully compensated would mean that all the insured's settlement could be applied to a medical payment subrogation claim with nothing left to compensate the insured for excess medical bills and personal injuries. Insurance companies accept premiums in exchange for medical payment coverage and may be obligated to pay medical expenses regardless of their insured's negligence or whether a third-party tortfeasor is liable... . In addition, there is little empirical substantiation that possible reimbursement through successful subrogation is considered in determining insurance premiums for medical payment coverage.

Thus, if the injured party's damages exceed the amount received in settlement of a claim against a responsible party, the injured party has *not* been fully compensated for the loss and, therefore, the medical payment insurer "is not entitled to any part of the proceed from the settlement" involved. This is a well recognized application of the rule.

Similarly, in *Rimes v. State Farm Mutual Automobile Insurance Company*, 106 Wisc.2d 263, 316 N.W.2d 348 (1982), another significant State case in this field, the court, commenting on the "make whole" rule,

stated that the rule applies "to an insurer claiming subrogation under contract" such that the insurer is "allowed no share in the recovery from the tortfeasor if the total amount recovered by the insured from the insurer and the wrongdoer does not cover his entire loss." The *Rimes* court reiterated:

> Thus, even though an insured has recovered from a tortfeasor a sum more than sufficient to equal the subrogated amount claimed by the insurer, the insurer is not entitled to subrogation unless the insured has been made whole for his loss. The purpose of subrogation is to prevent double recovery by the insured. Under circumstances where an insured has received full damages from the tortfeasor and has also been paid for a portion of those damages by the insurer, he receives double payment--he has been made more than whole. Only under those circumstances is the insurer, under principles of equity, entitled to subrogation. Subrogation is to be allowed only when the insured is compensated in full by recovery from the tortfeasor.

Without a made whole doctrine to balance the effect of subrogation, injured individuals can be completely divested of any right to recover for non-economic losses. Those losses include personal injuries and their nature and duration, the effect such injuries have on physical and mental health and well being of the injured person, mental anguish suffered in the past and which reasonably can be expected to continue into the future, the disfigurement and humiliation or embarrassment associated with that disfigurement, and loss of earnings in the past and which reasonably can be expected to continue into the future.

These issues therefore go directly to the impact of a serious injury on a person and his or her family, the stress of meeting expenses, the uncertainty of addressing long-

term care, the devastating and permanent change on lifestyle, and the ability to be a productive member of society. These interests and policy considerations bear upon not only the significance of the made whole doctrine but also to its application in ERISA situations. *Petitioners urge this Court to consider the make-whole rule not only within the context of federal common law but also as an equitable doctrine*, to be applied *even if* ERISA plan language specifically and comprehensively describes subrogation interests.

Of importance as well is the policy interest in ensuring that third party tortfeasors bear responsibility, including financial responsibility, for the harm that they cause either directly or negligently. There is a potential chilling effect which unquestioned application of absolute subrogation interests likely will have upon actions by injured beneficiaries against third party tortfeasors, an effect which strikes at fundamental interests of justice in ensuring negligent parties be made responsible for their conduct. If an injured plan beneficiary knows that any recovery would be totally absorbed by a plan's subrogation interests (depending on the extent of plan payments to the injured party) the beneficiary may elect not to initiate time-consuming and expensive litigation. Subrogation interests thus will stunt the process of tort recovery, even affecting the basic right of all citizens of access to the courts. This is too far to go to give effect to unilaterally-drafted subrogation language.

As has been indicated (see Greenblatt, above) *should it be necessary for one party to not be compensated, the insurer is in a much better position to be that party.* Thus, enrichment of the Fund may be "unjust" under the "make whole" rule, even if the claimant has "recouped substantial benefits" from the Fund.

D. ERISA Intent and Purposes

Federal courts reviewing the made whole rule in an ERISA context often refer to the necessity of meeting ERISA's purposes. Yet ERISA was intended not to protect benefit plan entities, but to protect employees and plan beneficiaries. In ERISA's opening provisions, 29 U.S.C. §1001(a), Congress expresses concern for "the continued well-being and security of millions of employees and their dependents" and declares that "disclosure be made and safeguards provided" for such beneficiaries. Congress observes that "despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits" and that "owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered." Similar Congressional findings and policy declarations in ERISA relate to underfunded pension liabilities, poorly managed plans, security of retirement funds for millions of employees, and conduct by employers which affects the viability of retirement funds. 29 U.S.C. §1001a and §1001b.

Therefore, the policies underlying ERISA are to protect employees from economic hardship and joblessness and to reward them for services to their employer. See, e.g., *Parker v. BankAmerica Corp.*, 50 F.3d 757 (9th Cir. 1995). ERISA thus is intended to protect beneficiaries from plan provisions which "snip and whittle at federally protected rights." *Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 431 F.Supp. 271 (E.D. Pa. 1977).

Such interests do not mandate judicial endorsement of every clause and provision of every ERISA plan. It is by no means contrary to ERISA to ensure that these plans do justice to their beneficiaries and that the plans be brought into alignment with well established principles and

doctrines. Thus, even an ERISA plan contains clear subrogation provisions, this does not close the debate. Equitable interests and concerns of justice, as well as the importance of holding negligent parties accountable for their actions, must be considered. There is nothing in ERISA which expressly prevents application of this rule to ERISA plans.

Adopting and applying the made whole rule more properly comports with the purposes and goals of ERISA. To say, as the Fourth Circuit and other federal courts have said, that the injustice generated by this rule is a matter for Congress is to ignore the remote realities of any effort to incorporate this rule into ERISA through Congressional action, to disregard the plain purposes of ERISA as declared by Congress in considering subrogation and the significant equitable considerations brought to bear by the made whole rule, and to neglect the role of the federal courts in interpreting ERISA.

E. Review By This Court Warranted

The interests at stake here are substantial. As the Greenblatt article notes with respect to the made whole rule and associated concerns, "The amount of money at stake boggles the mind... ." Nationwide, and over the course of years, billions of dollars may be involved. Given the continual division among federal courts in applying and interpreting the made whole doctrine in an ERISA context and the frequency of these issues, review and guidance by this Court is of paramount importance.

This Court recently granted *certiorari* in *Cement Masons Health and Welfare Trust Fund for North California v. Stone*, 197 F.3d 1003 (9th Cir. 1999) (S.Ct. case No. 99-1403), in which the Ninth Circuit decided that a health and welfare trust fund could not seek

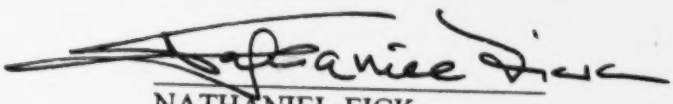
reimbursement for funds paid to a decedent from a sum recovered by the decedent's children in an action against a third party tortfeasor, because such reimbursement was not a remedy available to the trust fund under an ERISA section authorizing a participant, beneficiary, or fiduciary to seek "appropriate equitable relief." The *Cement Masons* court affirmed the District Court's dismissal of the trust fund's claim (although stating dismissal should have been on the merits rather than jurisdictional), because it determined that the ERISA section invoked (28 U.S.C. §1132(a)(3)) did not support the relief claimed. However, a review of the *Cement Masons* opinion reveals it was not decided on the basis of the made whole rule.

Further, this Court denied certiorari in *Cutting*. Petitioners have not identified a post-ERISA decision by this Court considering subrogation interests in situations presented by these circumstances, or reviewing or applying the made whole rule with respect to ERISA. Thus, this Court has yet to determine the overall application of the made whole rule in an ERISA context, including whether a plan's subrogation provisions, either general or specific, can avoid or eliminate the effect of the rule. The issues involved here affect ERISA plans throughout the country. Review of this issue by this Court would be of substantial value in settling a core issue in interpreting ERISA-qualified plans which continues to divide Federal courts. Petitioners urge that this Court grant this Petition and that it reverse the Fourth Circuit's decision affirming summary judgment issued to Respondents.

CONCLUSION

THEREFORE, Petitioners respectfully request of this Court that it GRANT their Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

RESPECTFULLY SUBMITTED,



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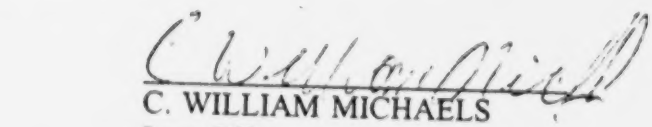

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APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

In the Matter of: SHAWN R. PARIS

ROBERT B. PARIS, natural father of Shawn R. Paris; WANDA C. PARIS, Guardian of Shawn R. Paris and natural mother of Shawn R. Paris,
Petitioners-Appellants,

v.

IRON WORKERS TRUST FUND, Local No. 5, Washington, D.C.,
Respondent-Appellee.

No. 99-1558

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Frederic N. Smalkin, District Judge.
(CA-99-613-S)

Argued: March 1, 2000

Decided: April 17, 2000

Before MICHAEL, Circuit Judge,
G. Ross ANDERSON, Jr., United States District Judge
for the District of South Carolina, sitting by designation,
and James H. MICHAEL, Jr., Senior United States District Judge
for the Western District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Nathaniel Crow Fick, Jr., FICK & PETTY, Towson, Maryland; C. William Michaels, Baltimore, Maryland, for Appellants. Francis Jude Martorana, O'DONOGHUE & O'DONOGHUE, Washington, D.C., for Appellee. **ON BRIEF:** Daniel J. McNeil, O'DONOGHUE & O'DONOGHUE, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Appellants appeal the district court's order granting summary judgment. The district court granted summary judgment on the basis that the make-whole doctrine* did not apply to the subrogation provision in the ERISA plan in question, thereby allowing subrogation of Appellants' recovery against a third party in favor of Appellee. Essentially, Appellants ask us either to adopt the make-whole doctrine as a matter of federal common law under ERISA or to find that state law governs the question of whether the make-whole doctrine applies and certify the question to the Maryland Court of Appeals. For the reasons stated below, we decline Appellants' request and affirm the district court.

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*The make-whole doctrine, when applicable, limits an insurer's right to subrogation of an insured's recovery against a third party. Generally, under the doctrine, an insurer is entitled to subrogation of an insured's recovery against a third party only to the extent that the combination of the proceeds the insurer has already paid to the insured and the insured's recovery from the third party exceed the insured's actual damages. In other words, the insured must be made whole before the insurer can exercise his right of subrogation. *See Harris v. Harvard Pilgrim Health Care, Inc.*, 20 F. Supp. 2d 143, 150 (D. Mass. 1998).

I.

Shawn R. Paris is a participant in the Iron Workers Fund (Fund). He sustained serious injuries in a motorcycle accident and submitted a claim for medical benefits under the Fund's ERISA-qualified Plan of Benefits (Plan). The Fund does not provide benefits to the extent of any recovery from a third party but will advance benefits prior to any such recovery subject to the following subrogation provision in the Plan:

> Once the Third Party's liability is resolved, you will be required to reimburse the Fund up to the full amount of the recovery for the full amount of loss of . . . benefits received. In such cases, the acceptance of benefits . . . constitutes an agreement . . . to reimburse the Fund for benefits paid up to the full amount of the recovery. . . . By accepting benefits from the Fund, the injured person agrees that any amounts recovered by the injured person by judgment, settlement or otherwise will be applied first to reimburse the Fund.

The Fund advanced over $200,000 in benefits and entered a subrogation agreement with Wanda C. Paris as guardian for Shawn. The subrogation agreement provides: "The Fund shall not be responsible for any of the Claimant's attorney's fees or the costs of Claimant's litigation."

Shawn's parents sued the driver of the other vehicle involved in the accident and settled that suit for $100,000. Although Shawn's damages clearly exceeded that amount, $100,000 was the limit of existing insurance coverage. The Parises filed a petition in Maryland state court seeking an apportionment of the settlement proceeds, asserting that the make-whole doctrine prevented subrogation by the Fund. The Fund sought the entire sum as partial reimbursement for the benefits it advanced. Neither party disputed that the Plan was subject to ERISA.

After removal from state court, the United States District Court for the District of Maryland granted the Fund's motion for summary judgment based on the clear and unequivocal language of the Plan. The district court had informed the parties' attorneys that Maryland

law was inapplicable and, in its order, refused to apply the make-whole doctrine as a matter of federal common law. The court also refused to permit a pro rata deduction of attorney's fees because of the subrogation agreement. After a de novo review of the relevant documents and the applicable law, we must affirm the district court.

II.

ERISA establishes a comprehensive regulatory scheme for self-funded employee benefit plans that preempts state law. The Supreme Court has noted that ERISA's preemption clause is conspicuously broad. *See FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990). "It establishes as an area of exclusive federal concern the subject of every state law that 'relate[s] to' an employee benefit plan governed by ERISA." *Id.* (alteration in original). Nonetheless, ERISA's regulatory scheme, though comprehensive, is not exhaustive, and in *United McGill Corp. v. Stinnett*, 154 F.3d 168 (4th Cir. 1998), we noted: "In enacting ERISA, Congress intended for the judiciary to develop a body of federal common law to supplement the statute's express provisions." 154 F.3d at 171. However, we also stated that "[c]ourts should only fashion federal common law when 'necessary to effectuate the purposes of ERISA'" and that "'[r]esort to federal common law generally is inappropriate when its application would . . . threaten to override the explicit terms of an established ERISA benefit plan.'" *Id.* (quoting *Singer v. Black & Decker Corp.*, 964 F.2d 1449, 1452 (4th Cir. 1992)). "Rather, one of the primary functions of ERISA is to ensure the integrity of written, bargained-for benefit plans." *Id.* at 172. Therefore, "the plain language of an ERISA plan must be enforced in accordance with 'its literal and natural meaning.'" *Id.* (quoting *Health Cost Controls v. Isbell*, 139 F.3d 1070, 1072 (6th Cir. 1997)).

III.

As an initial matter, Maryland law cannot govern the question of whether the make-whole doctrine applies in this case, for even if Maryland law spoke to the issue, ERISA preempts state law regarding subrogation rights. *See FMC Corp.*, 498 U.S. at 58, 65; *Hampton Indus., Inc. v. Sparrow*, 981 F.2d 726, 728-30 (4th Cir. 1992) (preemption of state statute limiting subrogation); *Harris v. Harvard Pil-*

grim Health Care, Inc., 20 F. Supp. 2d 143, 148-149 (D. Mass. 1998) (preemption of subrogation statute). The district court was therefore correct in notifying counsel that Maryland law was inapplicable and in treating the issue as a matter of federal law. Consequently, no basis exists for certifying a question to the Maryland Court of Appeals.

As a federal matter, our decision in *United McGill*, *supra*, prevents us from resorting to federal common law in this case, let alone adopting the make-whole doctrine as a new federal common-law principle for ERISA cases. As Appellants conceded at oral argument, the subrogation provision in the Fund's Plan is plain and clear. It entitles the Fund to reimbursement of the full amount of Appellants' recovery. We must enforce this unambiguous provision in accordance with its plain language and literal meaning, and it would therefore be inappropriate for us to override the provision by grafting onto it the make-whole doctrine.

In reviewing the Plan, we have kept in mind that contracts subject to the provisions of ERISA are very different from ordinary insurance contracts and are not subject to the same rules of construction. ERISA requires that drafters of plans use clear, ordinary language that is readily understandable by laypersons, whereas ordinary insurance contracts contain more particular and precise language, as well as confusing legalese and boilerplate. Applying the same doctrines and rules of construction to ERISA contracts that generally apply to insurance contracts, such as the make-whole doctrine or the rule requiring courts to construe insurance contracts strictly against their drafters, would frustrate the purposes of ERISA. As the Fifth Circuit stated in *Sunbeam-Oster Co. v. Whitehurst*, 102 F.3d 1368 (5th Cir. 1996): "[W]e should not (and will not) penalize [ERISA plans] for lack of technical precision or verbosity by labeling the Plan 'silent' or 'ambiguous' when it uses the kind of direct, jargon-free language that is mandated by ERISA for all summary plan descriptions . . . ." 102 F.3d at 1375. As to the plan in question, we find it equally as clear as the plan in *Sunbeam-Oster*, and we reach the same conclusion the Fifth Circuit reached there.

> When [the Plan's] language is read in context and viewed in light of all the circumstances, it can only mean that the Plan is entitled to be paid back by the beneficiary all

> amounts that the Plan has paid to the beneficiary, or on his *behalf, to the full extent . . . that the beneficiary recovers* from another source . . . .

Id. at 1375-76.

We note also that self-funded ERISA plans generally have very limited resources that they must use for the benefit of all their participants. Subrogation is an extremely important tool for maintaining the financial viability of such plans.

Our decision not to adopt the make-whole doctrine as a matter of federal common law in ERISA cases comports with the weight of authority addressing the issue. *See, e.g., Waller v. Hormel Foods Corp.*, 120 F.3d 138 (8th Cir. 1997); *Sunbeam-Oster, supra*; *Cutting v. Jerome Foods, Inc.*, 993 F.2d 1293 (7th Cir. 1993); *Great-West Life & Annuity Ins. Co. v. Barnhart*, 19 F. Supp. 2d 584 (N.D. W. Va. 1998). In addition, this case is distinguishable from *Barnes v. Independent Automobile Dealers Ass'n of California Health & Welfare Benefit Plan*, 64 F.3d 1389 (9th Cir. 1995), wherein the Ninth Circuit adopted, as a matter of federal common law, a rule that "in the absence of a clear contract provision to the contrary, an insured must be made whole before an insurer can enforce its right to subrogation." 64 F.3d at 1395. As the plan in this case contains a clear provision contrary to the make-whole doctrine, we need not consider adopting a rule similar to the Ninth Circuit's at this time. Furthermore, we reject Appellants' suggestion to follow Eleventh Circuit precedent holding that the make-whole doctrine is a default rule in ERISA cases limiting a plan's subrogation rights absent explicit preclusion of the doctrine by the plan. *See Cagle v. Bruner*, 112 F.3d 1510, 1521 (11th Cir. 1997). Such a rule would frustrate the purposes of ERISA by requiring plan drafters to inject legalese into plans rather than use clear, ordinary language explaining the plan's provisions. Laypersons generally would not understand a reference to the make-whole doctrine.

As a final matter, although it is questionable whether Appellants have properly appealed the district court's ruling as to attorney's fees, we note that the district court correctly decided that Appellants were not entitled to a pro rata deduction of attorney's fees. The subrogation

agreement in this case clearly addressed the issue of attorney's fees and was not inconsistent with any language in the Plan.

IV.

At oral argument, Appellants contended that ERISA unfairly grants drafters of plans broad power to override equitable doctrines such as the make-whole doctrine. Appellants urged us to restrict that power. However, while Congress has granted courts some authority under ERISA, that authority is limited. We must enforce the plain language of an ERISA plan that does not conflict with any of ERISA's provisions. Therefore, while we are aware of the possible hardships when an accident victim must reimburse a plan even when not made whole, Appellants' proper recourse is to Congress, not the courts.

For the reasons stated above, we affirm the district court.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN THE MATTER OF SHAWN R. PARIS	:	
	:	CIVIL NO.
: : : : : : : : : : : : : : :	:	S 99-613
IRON WORKERS TRUST FUND LOCAL NO. 5, WASHINGTON, DC	:	

MEMORANDUM OPINION

This is a case removed under the preemptive sweep of ERISA. The case was originally instituted by a petition filed in a Maryland state court seeking a declaration that the "make whole doctrine" cuts off the subrogation rights of the Iron Workers' Trust Fund, which is seeking reimbursement for considerable expenditures it has made for medical care and treatment furnished to its ERISA beneficiary, Shawn R. Paris, who was seriously injured in a motorcycle accident in Maryland in June of 1996. (The petition was amended following removal to this Court). The amended petition alleges that Shawn Paris sustained permanent brain injury and is now in the guardianship of his mother as a disabled, destitute adult child, under the Maryland Family Code.

The petition goes on to allege, in substance, that Shawn Paris is 24 years of age, with a life expectancy of approximately 51 additional years, and that litigation arising from the accident causing Shawn Paris' injuries was settled for $100,000.00, which is insufficient to satisfy the subrogation claim asserted by the Iron Workers' Trust Fund in this case.

The petition seeks a declaration that the "make whole doctrine" cuts off the subrogation rights of the Iron

Workers' Trust Fund, in that, without application of the "make whole doctrine," there would be no money left out of the settlement to care for Mr. Paris over the long term. A motion for summary judgment is pending and has been opposed. No further briefing or oral argument is needed. Local Rule 105.6, D. Md., as the motion raises only a legal issue that, albeit one of first impression in this District and Circuit, is clearly settled by weight of persuasive authority.

It is clear, at the outset, that this is a matter of federal law completely preempted by ERISA, rather than governed by state law. *See, e.g., Harris v. Harvard Pilgrim Health Care, Inc.*, 20 F.Supp.2d 143, 147 (D. Mass. 1998). A number of federal courts have dealt with the issue of whether, as a matter of federal common law (the gap-filler in ERISA cases), the "make whole doctrine" should be recognized. *See* cases collected *id.* at 150-151. The majority of Circuit Court cases that have dealt with the issue hold that even a "boilerplate" subrogation clause can override the "make whole doctrine," see *Cutting v. Jerome Foods, Inc.*, 993 F.2d 1293, 1297 (7th Cir. 1993), because the "make whole doctrine" is only an equitable gap-filler. *Id.*

Only the Eleventh Circuit has adopted a rule that is more favorable to the beneficiary, requiring an express repudiation of the doctrine in ERISA plan documents. *See Cagle v. Brunner*, 112 F.3d 1510, 1521 (11th Cir. 1997). Even in Circuits taking a generally pro-beneficiary position, an ERISA plan with language specifically allowing the plan "first reimbursement" is held to override the "make whole doctrine." *See, e.g., Barnes v. Independent Auto Dealers' Assn.*, 64 F.3d 1389, 1394 (9th Cir. 1995).

The Fourth Circuit has not spoken to the issue of whether--and to what extent--the "make whole doctrine" is part of the common law of ERISA. Given, however, the weight of authority as collected and analyzed in *Harris, supra* at 150-152, this Court is of the opinion that the plan language at issue here absolutely rules out any application

of the "make whole doctrine."

In relevant part, the plan provides:

> The Fund's subrogation right is established by the Plan... . Once the Third Party's liability is resolved, you will be required to reimburse the Fund up to the full amount of recovery for the full amount of loss of time benefits and/or medical benefits received... . By accepting benefits from the Fund, the insured person agrees that any amounts recovered by the insured person by judgment, settlement or otherwise will be first applied to reimburse the fund."

(Emphasis added).

Based on the clear and unequivocal language of the plan at issue here, there is absolutely no question that the petition in this case must be denied. *Barnes, supra.* To the extent that the petitioner's opposition memorandum can be read to suggest that the plan documents must mention the "make whole doctrine" *in haec verba*, the Court rejects such contention as unsupported by authority and unsound.

With regard to attorney's fees, the Court recognizes that, in *Harris*, 20 F. Supp.2d at 152-153, the Court allowed a *pro rata* reduction of the subrogated amount on account of reasonable attorney's fees. There was, however, no plan language or agreement in that case dealing with attorney's fees. Here, in contrast, there was a subrogation agreement entered into on behalf of Mr. Paris by his duly authorized agent, specifically providing that "[t]he Fund shall not be responsible for any of the Claimant's attorneys' fees or the costs of Claimant's litigation." In light of that provision, which is not inconsistent with the other language of the plan, the petitioner has no claim to a deduction of any portion of his attorney's fees from the amounts claimed by the Iron Workers' Trust Fund under its first right of reimbursement.

For the reasons stated, an Order will be entered separately, granting summary judgment in favor of the defendant Iron Workers' Trust Fund, Local No. 5, Washington, DC and against the petitioner, with each party to bear its own costs.

It is understood that this Court's order disposes only of the federal issue removed to this Court, and that any and all other issues relating to the trust fund in favor of Mr. Paris and its administration are not within this Court's jurisdiction.

/s/

Frederic N. Smalkin
United States District Judge

Dated: April 15, 1999

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN THE MATTER OF SHAWN R. PARIS	:	
	:	CIVIL NO.
: : : : : : : : : : : : : : : :	:	S 99-613
	:	
IRON WORKERS TRUST FUND LOCAL NO. 5, WASHINGTON, DC	:	

ORDER AND JUDGMENT

For the reasons stated in the foregoing Memorandum Opinion, it is, this 15th day of April, 1999, by the Court, ORDERED and ADJUDGED:

1. That defendant's motion for summary judgment BE, and it hereby IS, GRANTED;

2. That judgment BE, and it hereby IS, entered in favor of the defendant, and against the plaintiff, with each side bearing its own costs; and

3. That the Clerk of Court mail copies hereof to counsel for the parties.

/s/

Frederic N. Smalkin
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
District of Maryland

Chambers of
Frederic N. Smalkin
United States District Judge

101 West Lombard Street
Baltimore, Maryland
(410) 262-3840

March 15, 1999

LETTER TO COUNSEL

Re: In the Matter of Shawn R. Paris, Civil No. S 99-613

Dear Counsel:

I see that the defendant Iron Workers' Trust Fund has filed an answer and a counterclaim in this removed ERISA case.

I have determined that this case raises an issue of law that is potentially dispositive, and, accordingly, I shall not enter the ordinary scheduling order.

The issue is whether the ERISA benefit plan's subrogation clause in this case (which the defendant has not supplied in specific terms) precludes the "make-whole" doctrine's applicability.

In this connection, please note that Maryland law is beside the point, as the issue is one of federal common law, which is sensitive to the specific language of the subrogation clause at issue, if it applies at all (there being a circuit split on whether the "make-whole" doctrine is part of the federal common law of ERISA in the first place). For a fuller explication of these matters, *see, e.g., Harris v. Harvard Pilgrim Health Care, Inc.*, 20 F.Supp.2d 143 (D.Mass. 1998).

Therefore, the defendant is directed to file a motion for dismissal or summary judgment (discovery being unnecessary, as there is only an issue of law and there can be no dispute as to what the subrogation clause states) within 17 days hereof (14 days plus 3 days' mail transit time). Plaintiff will have 17 days to oppose the motion, and defendant may reply within 10 days of plaintiff's filing.

Although informal in nature, this is an Order of Court.

Very truly yours,

/s/
Frederic N. Smalkin
U.S. District Judge

APPENDIX E

ERISA PROVISIONS

29 U.S.C. §1001

Congressional findings and declaration of policy

(a) Benefit plans affecting interstate commerce and the Federal taxing power. The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the

termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries. It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries for financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance. It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN THE MATTER OF SHAWN ROBERT PARIS
* * * * * * * * * * * * *]
IRON WORKERS TRUST FUND] Civil Action No.
LOCAL NO.5, WASHINGTON, D.C. S- 99- 613
]
Interested Party - Defendant]

AMENDED PETITION FOR APPORTIONMENT OF SETTLEMENT PROCEEDS

COMES NOW Petitioners, WANDA C. PARIS, Guardian of Shawn R. Paris and as natural mother of Shawn R. Paris, and ROBERT B. PARIS, natural father of Shawn R. Paris, by and through their undersigned counsel, and here submit this Petition for apportionment by this Court of settlement proceeds received in the case of Wanda C. Paris as guardian of Shawn R. Paris and Robert B. Paris v. Andre Brinton Jaecks. And Petitioners state:

1. This matter arises from a motor vehicle accident that occurred in Anne Arundel County on or about June 25, 1996, on Quarterfield Road near Old Stage Road.

2. In the incident, Shawn R. Paris, who was riding his motorcycle, was severely injured, suffering permanent brain injuries as well as other injuries.

3. Subsequently, his natural mother Wanda C. Paris was appointed as the guardian of Shawn R. Paris, born February 3, 1975, by the Circuit Court for Anne Arundel County, which guardianship was established on or about August 28, 1996. ~~[and which guardianship remains an~~

~~open matter before this Court.~~].

4. Following this appointment, Wanda C. Paris in her capacity as guardian of Shawn R. Paris, and Wanda C. Paris and Robert B. Paris, in their capacities as natural parents of Shawn R. Paris, brought an action against Andre Brinton Jaecks, the other driver of the vehicle involved in the incident.

5. This action was filed with the Circuit Court for Anne Arundel County, in Case No. C-96-33325 MT.

6. In that action, it was alleged that Shawn R. Paris has sustained permanent and disabling injuries as a result of the accident, in that he is now unable to independently support himself, hold a job, earn a living, go to school, take care of his daily needs, and in other respects live and function independently.

7. In addition, it was alleged in the action that Shawn Paris by virtue of these injuries and the deficits which exist qualifies as a destitute adult child under Md. *Family Law* Code Ann., §13-102 and 13-103, which statutes require the parents of a destitute or disabled adult child to provide that adult child with care, comfort, support, food, and clothing.

8. It was alleged that this situation is expected to continue indefinitely.

9. It was further alleged that Wanda C. Paris, as guardian of Shawn Paris, and Wanda and Robert Paris, as parents of Shawn Paris, must now look forward to a lifetime of caring for their son, providing for his needs, and similar activities, due to their moral responsibilities as parents, her legal responsibility as guardian, and the parents' legal responsibilities under §13-102 and 13-103.

10. Shawn Paris is now 24 years of age [DOB: 02-03-75], and has a life expectancy of 51.2 years [United States Abridged Life Table, 1996, National Center for Health Statistics, U.S. Department of Health and Human Services].

11. The action sought damages of $515,000 in the claim of Wanda C. Paris against the Defendant, on behalf of Shawn Paris, damages of $3,000,000 in the claim of Wanda C. Paris as guardian and parent of Shawn Paris, and $3,000,000 in the claim of Robert Paris as parents of Shawn Paris.

12. Litigation in this matter proceeded, and in August of 1998, the matter was settled for a total amount of $100,000.00, the total of existing available coverage for all claims.

13. A release was executed between the parties on or about August 18, 1998 (a copy of the Release is attached to this Petition), and the sum of $100,000 was paid to Wanda C. Paris on behalf of Shawn Paris, and is now held by Wanda C. Paris, less or subject to appropriate deduction for attorney fees and costs related to the case.

14. As a result of treatment provided to Shawn Paris for his injuries, Shawn Paris has incurred substantial medical costs.

15. Insurers or other parties who have provided medical treatment to Shawn Paris have asserted certain subrogation rights in the settlement obtained by or on behalf of Shawn Paris in the action against Defendant Jaecks.

16. Those subrogation rights and the amounts claimed by Iron Workers Trust Fund, Local No. 5, exceed the net proceeds of funds otherwise distributable to Shawn Paris and to Wanda C. Paris and Robert Paris as parents of Shawn Paris.

17. The settlement obtained by or on behalf of Shawn Paris in the action against Defendant Jaecks does not and will not "make whole" Shawn Paris for his injuries and pain and suffering and past and future medical care, does not and will not "make whole" Wanda C. Paris in her responsibility as guardian of Shawn Paris, and does not and will not "make whole" Wanda C. Paris or Robert Paris in their respective responsibilities as parents of Shawn Paris.

18. Wanda **C.** Paris, in her responsibility as guardian, and Wanda **C.** Paris and Robert Paris as parents of Shawn Paris, now seeks the assistance of this Court in apportioning the net proceeds of the $100,000 settlement thus received.

19. In thus seeking this Court's assistance, Wanda **C.** Paris and Wanda **C.** Paris and Robert Paris state:

a. due to the effect of the "make whole" doctrine applied in numerous jurisdictions where recovery by an injured plaintiff from a third party is far below the level of **adequate** compensation for a person's injuries, pain, suffering, and past and future medical expenses, those asserting subrogation rights against such recovery may not assert full subrogation rights, since subrogation by or on behalf of others against recovery obtained by an injured plaintiff from a third party can be invoked only if the injured party has been "made whole" by such recovery;

b. the $100,000 settlement received by or on behalf of Shawn Paris does not and cannot "make whole" Shawn Paris himself for his injuries, pain and suffering, and past and future treatment, or "make whole" Wanda **C.** Paris in her responsibilities as guardian of Shawn Paris, or "make whole" Wanda C. Paris and Robert Paris in their moral and legal responsibilities as parents of Shawn Paris;

c. due to the effect of the "make whole" doctrine, the subrogation interests asserted by various parties as to Shawn Paris cannot be honored, and

d. the $100,000 settlement, less attorney fees and costs, thus must be retained by or on behalf of Shawn Paris to be devoted to compensation for his injuries and pain and suffering, and to the future care which is the responsibility of Wanda **C.** Paris and of Wanda C. Paris and Robert Paris.

THEREFORE, Wanda **C.** Paris, as guardian of Shawn Paris, **and Wanda C. Paris and Robert Paris, as**

natural parents of Shawn Paris seek an Order from this Court THAT:

a. the "make whole" doctrine applies to this matter and to the settlement obtained in Case No. C-96-33325 MT,

b. Shawn Paris, Wanda **C.** Paris, and Wanda **C.** Paris and Robert Paris, have not been "made whole" by the $100,000 settlement received,

c. subrogation rights asserted by various parties, either with respect to the present guardianship (No. C-96-30860) or with respect to the prior action (C-96-33325 MT) in which the $100,000 settlement was obtained, cannot be honored due to the effect of the "make whole" doctrine, and

d. the $100,000, less appropriate deductions for attorney fees and costs related to this case, is to be retained by Wanda **C.** Paris on behalf of Shawn Paris, as guardian, or by Wanda **C.** Paris and Robert Paris in their responsibilities as parents of Shawn Paris, to be devoted to the future care of Shawn Paris.

RESPECTFULLY SUBMITTED,

NATHANIEL FICK
(Federal Bar #01822)
Fick & Petty
1426 East Joppa Road
Towson, MD 21286-5982
(410) 321-6000
Attorney for Petitioners
Wanda **C.** Paris, Guardian of Shawn Paris, and
Wanda C. Paris and Robert Paris, natural parents of Shawn Paris

APPENDIX G

WANDA C. PARIS 7810 Clark Road Lot D-73 Jessup, Maryland 20794 Legal Guardian of the Person and Property of SHAWN ROBERT PARIS a disabled person 7810 Clark Road Lot D-73 Jessup, Maryland 20794 and WANDA C. PARIS and ROBERT B. PARIS 7810 Clark Road Lot D-73 Jessup, Maryland 20794 MT	*	IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY Case No. C-96-33325
Plaintiffs	*	
vs.	*	
ANDRE BRINTON JAECKS 1646 Isabella Court Millersville, Maryland 21108	*	
Defendant	*	

* * * * * * *

AMENDED COMPLAINT AND REQUEST FOR JURY TRIAL

WANDA C. PARIS, as Legal Guardian of the Person and Property of SHAWN PARIS, a disabled person, and WANDA C. PARIS and ROBERT B. PARIS, by and through Nathaniel Fick, their attorney, now comes before this Court to seek damages against ANDRE BRINTON JAECKS, Defendant. And they state:

Jurisdiction and Venue

1. This Court has jurisdiction of this action pursuant to Maryland Code Annotated, Courts & Judicial Proceedings, §1-501.

2. Venue is proper in this judicial circuit pursuant to Maryland Code Annotated, Courts & Judicial Proceedings, §6-202(8).

Parties

3. WANDA C. PARIS is a citizen of the State of Maryland residing in Anne Arundel County, at all times relevant hereto was married to Robert B. Paris, and is natural parent of Shawn Paris.

4. ROBERT B. PARIS is a citizen of the State of Maryland residing in Anne Arundel County, at all times relevant hereto was married to Wanda C. Paris, and is natural parent of Shawn Paris.

5. Defendant, ANDRE BRINTON JAECKS is an adult citizen of the State of Maryland residing in Anne Arundel County, and is not in the military service or in the active military reserves.

Allegations of Fact Common to All Counts

6. On or about June 25, 1996, Shawn Robert Paris was operating his motorcycle in a lawful manner on the roadways of Anne Arundel County, on the left westbound lane of Quarterfield Road, at or near its intersection with Old Stage Road.

7. At that time and place, a motor vehicle being operated by Andrew Brinton Jaecks entered Quarterfield Road from a parking lot on Mr. Paris' right, perpendicular to Quarterfield Road.

8. Apparently, Mr. Jaecks intended to cross the westbound lane and turn left onto the eastbound lane of Quarterfield Road.

9. As Mr. Jaecks' vehicle was crossing the right, westbound lane of Quarterfield Road, into Mr. Paris' view of travel, a van on Mr. Paris' right obstructed his view of Mr. Jaecks' vehicle.

10. Mr. Jaecks' vehicle entered the roadway and stopped suddenly, directly in front of Mr. Paris, to wait for traffic approaching from the eastbound lane.

11. Mr. Paris therefore had no advance notice of Mr. Jaecks' vehicle entering the lane in which Mr. Paris was traveling in his motorcycle and thus had no time or opportunity to stop his motorcycle, or to take other evasive action to avoid a collision with Mr. Jaecks' vehicle.

12. Mr. Paris' motorcycle thus was caused to, and did, collide broadside and at full speed into the left side of Mr. Jaecks' vehicle.

13. The collision caused Mr. Paris to be ejected from his motorcycle and to be propelled forward, into the air, landing with great force and impact upon the pavement.

COUNT ONE

1. Plaintiff Wanda Paris, on behalf of Shawn Paris, incorporates all facts and allegations made in Nos. 1-13 above.

2. Defendant Mr. Jaecks negligently operated his vehicle on the date in question.

3. Defendant was traveling at an improper rate of speed.

4. Defendant did not operate his vehicle properly for conditions.

5. Defendant did not keep a careful lookout for other vehicles.

6. Defendant had a duty to exercise due care in the operation of his vehicle, so as not to endanger the lives and safety of others lawfully upon the highway, but notwithstanding this duty, and in direct disregard of that duty, defendant operated his vehicle dangerously and recklessly.

7. Defendant entered a favored highway without yielding to approaching traffic lawfully on that highway, and otherwise failed to obey the traffic laws of the State of Maryland.

8. The impact of the vehicles and the resulting pain, suffering, loss of enjoyment of life, limitation of motion, property damage, and other consequences to Mr. Paris, present and future, are due to the negligence of Defendant Mr. Jaecks.

WHEREFORE, this law suit is brought and damages are claimed by Plaintiff Wanda C. Paris on behalf of Shawn Paris against Defendant Andrew Brinton Jaecks in the amount of Five Hundred and Fifteen Thousand Dollars ($515,000.00).

COUNT TWO

1. Plaintiff Wanda Paris, on her own behalf, incorporates all facts and allegations made in Nos. 1-13 above.

2. As a result of the severe injuries sustained in the accident of June 25, 1996, Shawn Paris, born February 3, 1975, has become mentally disabled, physically disabled, with the result that, among other things, he is unable to support himself, hold a job, earn a living, go to school, take care of daily needs, or interact at an adult level with others.

3. Wanda Paris is the mother of Shawn Paris.

4. Especially since the accident, Shawn Paris has lived in the household of Wanda Paris and Robert B. Paris, and Wanda Paris has been caring for the needs and

requirements of her son.

5. This situation is expected to continue indefinitely.

6. Shawn Paris, due to his condition, qualifies as a destitute adult child under Md. *Family Law* Code Ann., §13-102 and 13-103, requiring parents of a destitute or disabled adult child to provide care, comfort, support, food, shelter, and clothing.

7. Wanda Paris thus has a statutory duty to care for her son, which duty as imposed by law establishes a comparable cause of action against an individual who, through his negligence, has caused or contributed to her son becoming disabled.

8. Wanda Paris must now look forward to a lifetime of caring for her son, providing for his needs, and similar activities, due to her own responsibility to her son as well as the responsibility imposed by law, with the accompanying anguish and expense, as well as the resulting loss of enjoyment of loss and leisure time for Wanda Paris.

9. All of these results are due to the negligence of Defendant.

10. Wanda Paris has not taken or failed to take any action which caused or contributed to the situation here described.

THEREFORE, Plaintiff Wanda Paris brings this action and seeks damages against Defendant Andrew Brinton Jaecks in the amount of Three Million Dollars ($3,000,000.00).

COUNT THREE

1. Plaintiff Robert Paris, on his own behalf, incorporates all facts and allegations made in Nos. 1-13 above.

2. As a result of the severe injuries sustained in the accident of June 25, 1996, Shawn Paris, born February 3, 1975, has become mentally disabled, physically disabled, with the result that, among other things, he is unable to

support himself, hold a job, earn a living, go to school, take care of daily needs, or interact at an adult level with others.

3. Robert Paris is the father of Shawn Paris.

4. Especially since the accident, Shawn Paris has lived in the household of Wanda Paris and Robert B. Paris, and Wanda Paris has been caring for the needs and requirements of his son.

5. This situation is expected to continue indefinitely.

6. Shawn Paris, due to his condition, qualifies as a destitute adult child under Md. *Family Law* Code Ann., §13-102 and 13-103, requiring parents of a destitute or disabled adult child to provide care, comfort, support, food, shelter, and clothing.

7. Robert Paris thus has a statutory duty to care for his son, which duty as imposed by law establishes a comparable cause of action against an individual who, through his negligence, has caused or contributed to his son becoming disabled.

8. Robert Paris must now look forward to a lifetime of caring for his son, providing for his needs, and similar activities, due to his own responsibility to his son as well as the responsibility imposed by law, with the accompanying anguish and expense, as well as the resulting loss of enjoyment of loss and leisure time for Robert Paris.

9. All of these results are due to the negligence of Defendant.

10. Robert Paris has not taken or failed to take any action which caused or contributed to the situation here described.

THEREFORE, Plaintiff Robert Paris brings this action and seeks damages against Defendant Andrew Brinton Jaecks in the amount of Three Million Dollars ($3,000,000.00).

DEMAND FOR JURY TRIAL

Plaintiffs respectfully request that this matter be set for trial before a jury of all issues raised by this Complaint and causes of action as alleged triable to a jury in this State.

RESPECTFULLY SUBMITTED,

Nathaniel Fick, P.C.

NATHANIEL FICK
Fick & Petty
1426 East Joppa Road
Towson, MD 21286-5982
(410) 321-6000
Fax: (410) 321-5707

Attorney for Plaintiffs

(2)

No. 00-94

Supreme Court, U.S.
FILED
AUG 16 2000
CLERK

IN THE

Supreme Court of the United States

WANDA C. PARIS Guardian of SHAWN R. PARIS
and Natural Mother of SHAWN R. PARIS
and ROBERT B. PARIS Natural Father
of SHAWN R. PARIS,

Petitioners,

v.

IRON WORKERS TRUST FUND
LOCAL NO.5,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Respondent, Iron Workers Trust Fund Local No. 5 Health Fund, Washington, D.C. ("Trust Fund" or "Plan") finds the Statement of the Case set forth by Petitioners to be incomplete or inaccurate with respect to the following. First, the subrogation and reimbursement provisions of the Plan as well as the subrogation agreement signed by Mr. Paris and his mother are quoted only in part in the petition. Because of the importance of these documents, they have been set forth in the Appendix to this brief in opposition. Second, as the signed agreement demonstrates, Mr. Paris' former attorney, who initially represented Mr. Paris in his action against the third-party tort feasor, also signed the agreement. (*See* Respondent's Appendix at 16a.)

Third, Respondent disagrees with Petitioners' statement at page 5 of their petition regarding Mr. Paris' physical and mental condition and his future prognosis as well as the statement that such matters cannot be disputed. There is nothing in the record regarding Mr. Paris' condition. All such statements have merely been asserted by Petitioners' counsel in the Amended Petition for Apportionment filed with the District Court, in Petitioners' brief filed with the Fourth Circuit and by counsel at oral argument. There is no record evidence to support these claims nor is there any record evidence to support the contention that Mr. Paris has not been made whole. These matters were simply assumed, for purposes of the Respondent Trust Fund's summary judgment motion.

Fourth, contrary to Petitioners' assertion, the Fourth Circuit in the case below, did not reject "any contention that the 'make whole' doctrine can be incorporated in the federal common law of ERISA." (Petition at 9.) The court merely stated that it did not have to reach the issue because the doctrine was not applicable to this case where the subrogation

language was unambiguous. (Petition Appendix at 5a-6a and see discussion *infra* at 5.)

Finally, Petitioners incorrectly characterize the Fourth Circuit's decision as "recognizing the inherent injustice in its approach." (Petition as 11.) The court merely pointed out that it was aware that there were "possible" hardships when an accident victim had to reimburse a plan for his recovery from a third party. (Petitioner Appendix at 7a.)

ARGUMENT

I. THERE IS NO COMPELLING REASON TO GRANT CERTIORARI IN THIS CASE AS ALL CIRCUITS AGREE THAT THE "MAKE WHOLE" DOCTRINE CAN BE OVERRIDDEN BY PLAN LANGUAGE

This case simply does not present a compelling reason for a grant of the petition for writ of certiorari. Although there are perhaps shades of differences in how the Circuits approach and apply the concept of the "make whole" doctrine, all Circuits that have had occasion to address the issue agree that ERISA plan or contract language can override the doctrine. A review of the Circuit law confirms this unanimity.

In *Harris v. Harvard Pilgrim Health Care, Inc.*, 208 F.3d 274 (1st Cir. 2000), the First Circuit concluded that standard subrogation language in an ERISA plan that entitled the plan "to recover from a Member the value of services provided, arranged, or paid for, when the Member was reimbursed for the cost of care by another party" afforded the plan first priority even where the participant was not fully compensated for his injuries. *Id.* at 276 and 281. Although questioning whether the make whole rule should ever be adopted as an ERISA default rule, the Court also held that where the plan required, without qualification, reimbursement by the participant who secures a recovery, there should be no

"implied contingency such as the 'make whole' doctrine" read into a plan that is written in "straightforward language comprehensible by the average plan participant." *Id.* at 280.

In addressing an issue closely related to the make whole doctrine, the Third Circuit in, *Ryan by Capria-Ryan v. Federal Express Corp.*, 78 F.3d 123 (3rd Cir. 1996), rejected a claim that the court should apply a common law doctrine of unjust enrichment to reduce a recovery required to be reimbursed to an ERISA plan, under a subrogation agreement, by a pro rata share of the attorney's fees expended by the participant in collecting the recovery. The Court held that federal common law should be fashioned only when necessary to fill in a plan interstitially but not to rewrite or torture straightforward language into meanings the parties never intended. *Id.* at 127.

In *Sunbeam-Oster Co., Inc. Group Benefits Plan for Salaried and Non-Bargaining Hourly Employees v. Whitehurst,* 102 F.3d 1368 (5th Cir. 1996) the Fifth Circuit was faced with a participant who refused to reimburse the Fund from a recovery because he was not made whole. Questioning whether or not the "make whole" doctrine even applies to an ERISA plan, the Court did not have to reach that question because it found the ERISA plan subrogation language clear and unambiguous. Thus it held that a provision that gave "the Plan the right to collect money that you receive in a settlement or lawsuit..." required reimbursement notwithstanding that the participant had not been made whole. *Id.* at 1375-76.

In *Copeland Oaks and Copeland Oaks Employee Benefit Plan v. Haupt,* 209 F.3d 811 (6th Cir. 2000) the Sixth Circuit reviewed an ERISA plan subrogation provision where a participant had refused to reimburse the plan for monies collected from an insurer. The Court held that the "make whole" rule is a default rule that does not apply unless a plan is ambiguous and fails to specify both the "priority of the

funds recovered and a right to any full or partial recovery." *Id.* at 813.

In *Cutting v. Jerome Foods, Inc.*, 993 F.2d 1293 (7th Cir. 1993), the Seventh Circuit addressed a participant's claim that a subrogation agreement that provided that the "Plan shall be subrogated ... to the extent of any and all payments made or to be made hereunder by the Plan" could not be enforced where she was not made whole. *Id.* at 1295. The court held that the "make whole" doctrine is a rule of contract interpretation and a "gap filler" that may be overridden by clear language. It concluded that the company's interpretation —that the subrogation agreement disclaimed the make whole doctrine—was not unreasonable and was entitled to deference. *Id.* at 1299.

In *Waller v. Hormel Foods Corp.*, 120 F.3d 138, 139 (8th Cir. 1997), the Eighth Circuit reviewed plan language that provided that "the company shall be subrogated to all rights of recovery which you or your dependent, receiving such payment, may have against any person or organization." The Court held that the language overrode the make whole doctrine. It found that the language gave first priority to the plan and the silence of the plan on what happens if the participant obtains only a partial recovery for his injuries simply means that partial recovery is treated the same as if there is a full recovery, to wit, the plan must be reimbursed first. *Id.* at 140.

In *Barnes v. Indep. Auto Dealers Ass'n*, 64 F. 3d 1389 (9th Cir. 1995), the Ninth Circuit found that the plan subrogation provision did not apply unless the Plan actually made a payment of benefits to the participant. Since the plan had not made a payment in this case, the provision did not apply and the court determined that the make whole doctrine would be applied as a "gap filler". Since the plan did not have "the right of first reimbursement out of any recovery" the court found it appropriate to apply the make whole rule *Id.* at 1395.

In *Cagle v. Bruner,* 112 F.3d 1510 (11th Cir. 1997), the Eleventh Circuit held that the make whole doctrine is a default rule for ERISA plans under federal common law that will be applied if the plan language does not explicitly exclude it. It found that a subrogation agreement that required the participant to "reimburse the Plan in full from the proceeds of any recovery received" did not clearly reject the make whole doctrine. *Id.* at 1521.

This considerable level of agreement among the Circuits makes this a poor candidate for the Supreme Court's consideration. The differences among the Circuits are simply not sufficient, nor ripe for review.

While it is clear that not all Circuits have determined the extent to which the make whole doctrine should be adopted as federal common law, that issue is not squarely presented in this case. The Fourth Circuit did not hold that it was rejecting the make whole doctrine as part of federal common law, it simply held that it did not have to reach the issue. Thus after reviewing Circuit law including *United McGill Corp. v. Stinnett,* 154 F.3d 168 (4th Cir. 1998), which held that resort to federal common law is inappropriate when it would "threaten to override the explicit terms of an established ERISA benefit plan." *Id.* at 171, the court held that it would not resort to federal common law in this case where the Plan language was unambiguous. (Petition Appendix at 5a.) Similarly, the Fourth Circuit distinguished the Ninth Circuit's decision in *Barnes v. Automobile Dealers Ass'n of California Health & Welfare Benefit Plan,* 64 F.3d 1389 (9th Cir. 1995), pointing out that in that case the court had found no clear provision contrary to the make whole doctrine. The Fourth Circuit concluded that since the plan in this case was unambiguous it "need not consider adopting a rule similar to the Ninth Circuit's at this time." (Petition Appendix at 6a.)

Thus the Fourth Circuit left for another day whether or not the make whole doctrine should, under some circumstances,

be incorporated into federal common law. While this approach might be different from other circuits, such as the Ninth and the Eleventh Circuits, which first held that the make whole doctrine was part of federal common law and then determined whether the doctrine should be applied to the facts of the case, the result is the same. If plan or contract language is unambiguous in its preclusion of the doctrine, all Circuits would decline to impose the make whole doctrine.

II. THE PLAN LANUGUAGE IN THE INSTANT CASE IS UNAMBIGUOUS SO THERE IS NO NEED TO DETERMINE THE EXTENT TO WHICH FEDERAL COMMON LAW ENCOMPASSES THE MAKE WHOLE DOCTRINE

Petitioners argue that the Fourth Circuit erred in its finding that the Plan language in this case was unambiguous and precludes the adoption of the make whole doctrine. Apparently Petitioners argue that unless the Plan language explicitly makes reference to the "make whole" doctrine and the rejection of that doctrine a court must apply the doctrine as part of an ERISA federal common law. (Petition at 14 and 23.) Initially, it needs to be pointed out that the Fourth Circuit's interpretation of the Plan subrogation language hardly presents a compelling reason to grant a writ of certiorari. As noted above, the Fourth Circuit did not hold that it was rejecting the make whole doctrine as a valid ERISA federal common law principle but only that it would not apply it in this case where the contract language was clear. Thus the issue presented relates singularly to Respondent's Plan language and would not give the Court the opportunity to rule more broadly on the issue.

With regards to the Plan's subrogation language itself,[1] the Fourth Circuit found, after a de novo review[2], the Plan language unambiguous and noted that the Petitioners agreed:

> As the Appellants conceded at oral argument, the subrogation provision in the Fund's Plan is plain and clear. It entitles the Fund to reimbursement of the full amount of Appellants' recovery.

(Petition Appendix at 5a.) An examination of the Plan reveals, as the Fourth Circuit found, that the drafters clearly set forth the rights and responsibilities of the parties.

The Plan and subrogation agreement, the latter signed by Petitioners and their former attorney, are both very specific and unambiguous as to the rights of the parties. The Plan states that "if you [the claimant] should recover damages

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[1] Although the Plan language is referred throughout this brief and the Fourth Circuit's decision as a "subrogation" provision, it is actually in large part a reimbursement provision which requires a participant to reimburse the Plan any recovery recouped from a third-party. *See Unisys Medical Plan v. Timms*, 98 F.3d 971, 973 (7th Cir. 1996), for a discussion of the distinction.

[2] The court applied a de novo review even though it could and should have deferred to the Plan administrator's interpretation. Under this Court's case law, a court will interpret the language of an ERISA plan de novo unless the plan in question expressly grants discretionary authority to the plan administrator. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989)). If an express grant of authority is present, the plan administrator's interpretation is reviewed for an abuse of discretion. *Id.* According to the terms of the Plan, the Trustees of the Trust Fund have "full discretion and authority to interpret the terms of the Trust and the Plan of Benefits" set forth in the document. Thus the court should have deferred to the Trustees' interpretation. *See Cagle v. Bruner*, 112 F.3d 1510, 1519 (11th Cir. 1997) (ERISA fund did not act arbitrarily and capriciously in requiring beneficiary to sign subrogation agreement where interpretation of the plan's requirements was reasonable).

from an insurance company or from the other party (for example in a lawsuit), then you must reimburse the Plan for the payments it has made in connection with your injury." (Respondent's Appendix at 2a.) With respect to situations where the Trust Fund advances medical payments to the claimant pending the resolution of a lawsuit against a third party, the Plan provides:

> Once the Third Party's liability is resolved, you will be required to reimburse the Fund up to the full amount of the recovery for the full amount of loss of time benefits and/or medical benefits received. In such cases, the acceptance of benefits, by you or your dependent or someone acting on your or your dependent's behalf, constitutes an agreement by the injured person to reimburse the Fund for benefits paid up to the full amount of the recovery due to the injury or illness. By accepting benefits from the Fund, the injured person agrees that any amounts recovered by the injured person by judgments, settlement, or otherwise will be applied first to reimburse the Fund.

Id at 2a-3a. Thus, as demonstrated by the aforementioned language, the Plan clearly states that "[b]y accepting benefits from the Fund, the injured person agrees that any amounts recovered . . . by judgment settlement, or otherwise will be applied *first* to reimburse the Fund." (emphasis added).

The subrogation agreement, signed by Wanda Paris, on behalf of Shawn Paris is equally unambiguous. It provides:

> The Claimant, in consideration for payment by the Fund of medical expenses and/or weekly accident payments arising from his or her injury which constitutes good, valuable and sufficient consideration, does hereby assign, transfer and subrogate to the Fund any and all sums of money received, now due and owing to him or her or later received from a Third Party or other person,

> firm, corporation, or entity for which is referenced above.

The agreement further states,

> Any sums recovered by the Claimant from the Third Party or other person, firm, corporation or entity, either by judgement [sic] or settlement and regardless of whether such sums are designated as reimbursement for medical expenses incurred or anticipated or past or future wage losses as pain and suffering or as any other form of damages shall be applied first to reimburse the Fund.

(Respondent's Appendix at 11a-12a.)

This language could not be more specific: any money collected by the participant must be "applied first to reimburse the Fund." There is no ambiguity nor is there any gap to be filled in the language of either the Plan or the subrogation agreement. Thus, there is no need to fashion or apply any federal common law to add to or clarify the unambiguous Plan language. The Fourth Circuit was correct in its analysis.

While some courts have indicated that they would require explicit language rejecting the make whole doctrine, most of these courts were not confronted with language as clear as the above. A review of these cases, cited by Petitioners in support of their petition, confirms this critical distinction.

In *Barnes v. Indep. Auto. Dealers Ass'n*, 64 F.3d at 1389 (9th Cir. 1995), the court found that the plan subrogation language did not apply since the plan never made a payment to the participant. In light of the absence of any provision, the court then determined that it needed to address the issue of a gap filler. It applied the make-whole principle in the light of a silent plan that did not provide "the Plan the right of first reimbursement out of any recovery Barnes was able to

obtain even if Barnes was not made whole." *Barnes*, 64 F.3d at 1395; *see also Hartenbower v. Electrical Specialties Co. Health Benefit Fund*, 977 F. Supp. 875, 883 (N.D. Ill. 1997) (court reviewed plan language that provided that the plan "shall succeed to individual rights of recovery against any such third party to the full extent of the value of any such benefits" and found it unclear but suggested that a plan that states "that it has the 'right of first reimbursement'" may be sufficient to defeat make whole remedy).

Similarly, in *Cagle v. Bruner*, 112 F.3d 1510 (11th Cir. 1997), while recognizing that plans may expressly exclude application of the "make whole" doctrine, the court applied the doctrine where the plan subrogation clause simply gave the plan "the right to be reimbursed therefor through subrogation." 112 F. 3d at 1521. The court concluded that the "make whole" doctrine is overridden when the plan includes language "'specifically allow[ing] the Plan the right of first reimbursement out of any recovery [the participant] was able to obtain even if the participant were not made whole.'" *Id.* at 1522 *citing, Barnes*, 64 F.3d at 1395.[3]

In sum, Petitioners have not demonstrated that the issue presented in this case would have been decided differently if considered in any of these other *Circuits*. At most, they can argue that another Circuit *might* have interpreted the Plan language differently. This, however, is not a sound basis for a grant of a writ of certiorari, particularly where Petitioners conceded at oral argument before the Fourth Circuit that the Plan language in this case is clear and requires reimbursement in full.

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[3] *Copeland Oaks and Copeland Oaks Employee Benefit Plan v. Haupt*, 209 F.3d 811 (6th Cir. 2000), is the only case that explicitly requires Plan language to both establish the plan's priority as well as its right to reimbursement of "partial" recoveries to override the make whole doctrine.

Finally, Petitioners assert an alternative argument that even if the plan language expressly overrides the make whole doctrine, the doctrine should nonetheless be superimposed over the clear language in the form of a court-adopted equitable policy as a proportionate means of dividing the recovery. (Petition at 23.) In other words, Petitioners argue that neither an insurer nor a plan, under ERISA federal common law, should be able to override the "make whole" doctrine.

This argument is advanced despite the fact that, with few exceptions, both federal and state courts have consistently found that an insurance contract or plan can preclude the application of the make-whole doctrine and require full reimbursement notwithstanding only a partial recovery. Indeed, in *Shelter Insurance Companies v. Fohlich,* 243 Neb. 111, 498 N.W.2d 74 (Neb. 1993), cited by Petitioners to support their unique theory, the state court recognized that an insurance policy could override the make whole doctrine. *Id.* at 122. In reaching this conclusion the court commented:

> research indicates that that nearly every [state] appellate court that has considered the question has recognized that unless an insurance policy contains a provision to the contrary, an insurer's right to recover under a subrogation clause of an insurance policy requires that the insured must have been fully compensated for the loss covered by the policy.

Id. at 121.[4] Thus Petitioners asked the Court to accept this case to apply a principle adopted by no federal

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[4] Although Petitioners cite to one state court decision where, through its silence with regard to the ability of insurance policies to override the make whole doctrine, they assert it supports their argument, this is not the whole story. *See* Petition at 25 and the citation to *Rimes v. State Farm Mutual Automobile Insurance Co.,* 106 Wis.2d 263, 316 N.W.2d 348 (Wis. 1982). In *Ninas v. State Farm Mutual Automobile Insurance Co.,* 220 Wis.2d 869, 584 N.W.2d 545 (Wis. Ct. App. 1998), the Wisconsin

court and few, if any, state courts.[5] This request should be denied.

CONCLUSION

For the foregoing reasons, the Court should decline to grant a writ of certiorari in this case. Petitioners have failed to present any compelling reason for review. At most, Petitioners quibble over the Fourth Circuit's review and interpretation of an ERISA plan language; they would simply interpret it differently. This forms no basis for review.

Respectfully submitted,

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appellate court recognized that ERISA plans are not subject to state law and that the make whole doctrine is used in these class of cases only as a "default" rule. *Id.* at 875.

[5] Moreover, Petitioner's attempts to engraft the most restrictive insurance contract principles it can find onto ERISA plans is misguided. As the Fourth Circuit recognized, ERISA funds are very different from insurance contracts and "[a]pplying the same doctrines and rules of construction to ERISA contracts... would frustrate the purposes of ERISA. (Petition Appendix at 5a); and *see Waller v. Hormel Foods Corp.*, 120 F.3d 138, 140 (8th Cir. 1997) ("there is good reason not to read ERISA plans like insurance policies.")

APPENDIX

Iron Workers Trust Fund
Local No. 5
Summary Plan Description

AMENDMENT TO THE IRON WORKERS
LOCAL UNION NO. 5 TRUST FUND

The Trustees of the Iron Workers Local No. 5 Trust Fund hereby amend the Plan as follows:

The "SUBROGATION OF THIRD PARTY—ACCIDENT CLAIMS" provision at page 57 of the current Plan shall be amended to provide for the following:

SUBROGATION OF THIRD PARTY—ACCIDENT CLAIMS

If you or one of your dependents are involved in an accident or sustain an illness or injury for which a Third Party might be liable to you for medical expenses normally covered by this Plan, the Fund will only pay the portion of medical and loss of time benefits not covered by any recovery from the Third Party. In the case of medical expenses, you will. not receive benefit payments from this Fund for such illness or injury until the Third Party's liability for these expenses is finally resolved through settlement or court determination. Following the resolution of the Third Party's liability, the Fund will pay medical expenses normally allowed under the Plan only to the extent monies have not been paid by the Third Party. The Fund will take into account all amounts paid by the Third Party regardless of how the amounts are characterized.

An example of this would be if an employee were injured in an automobile accident which was the other driver's fault. The Fund would pay no medical expenses pending the outcome of the resolution of the other driver's liability. If the employee eventually received

$3500 from the other driver or his insurance company, but the medical benefits related to the accident which would have been paid by the Plan totalled $5000, the Fund would pay $1500, the difference between the total medical benefits and the amount received from the other driver.

If the Plan does pay covered benefits prior to the resolution of a third party's liability such as in the case of weekly loss of time benefits, payment involving hardship or mistaken payment, you must reimburse the Fund. If you should recover damages from an insurance company or from the other party (for example, in a lawsuit), then you must reimburse the Plan for the payments it has made in connection with your injury. If you are injured by another party, as a condition of receiving benefits from the Fund, you are required to sign a form acknowledging the Fund's right to recover. The Fund's subrogation right is established by the Plan and not by the form. In the event you receive benefits in such a case, the Fund's subrogation interest in your recovery is governed by the terms of the Plan whether or not you have signed a form.

The Trustees, in their sole discretion, may determine that an exception may be made to the policy of non-payment of benefits pending resolution of the Third Party's liability because of compelling circumstances involving hardship.

In the case of weekly loss of time benefits, the Fund will pay these benefits if you are entitled to them under the terms of the Plan during the pendency of the resolution of the Third Party's liability.

Once the Third Party's liability is resolved, you will be required to reimburse the Fund up to the full amount of the recovery for the full amount of loss of time benefits

and/or medical benefits received. In such cases, the acceptance of benefits by you or your dependent or someone acting on your or your dependent's behalf constitutes an agreement by the injured person to reimburse the Fund for benefits paid up to the full amount of the recovery due to the injury or illness. By accepting benefits from the Fund, the injured person agrees that any amounts recovered by the injured person by judgment, settlement or otherwise will be applied first to reimburse the Fund. Amounts recovered by the injured person in excess of benefits paid by the Fund are the separate property of the injured person.

By accepting benefits from the Fund, the injured person agrees to notify the Fund promptly in the event suit is filed to recover amounts in connection with the injury and agrees to notify the Fund promptly in the event the injured person or someone acting on his or her behalf receives payments from any source for claims related to the injury. By accepting benefits from the Fund the injured person agrees that neither the injured person nor anyone acting on behalf of the injured person will settle any claim relating to the accident or illness without the written consent of the Fund.

In the event an injured person accepts benefits from the Fund and amounts are recovered from claims arising from an accident or illness, the amounts recovered are assets of the Fund by virtue of the Fund's subrogation interest. Such Fund assets may not be distributed without a release from the Fund of its subrogation interest.

In the event monies are recovered and the Fund is not reimbursed to the extent of its subrogation interest in accordance with these Plan provisions, the Fund may bring suit against the injured person, insurers and any recipients of the Fund assets improperly distributed without the consent of the Fund. The Fund may recover

benefits paid on behalf of the injured person by treating such benefits as an advance and deducting these amounts from benefits which become due to the injured person and his or her immediate family until the Fund's subrogation interest is recovered. Such benefits may be deducted from amounts due to third parties who have provided medical services despite any certification of coverage which the Plan may have given to such providers.

When you file a claim for injuries or an illness resulting from an accident or for which a Third Party may be liable, you are obligated to provide the Fund with this information. The Fund Office may request further information about the circumstances of the illness or injury. If you receive benefits prior to the resolution of the Third Party's liability, such as loss of time benefits, you will be required to sign an Acknowledgement of these Plan provisions.

The "SUBROGATION NOTICE" provision at page 62 of the current Plan shall be deleted in its entirety.

The "SUBROGATION FORM" at page 63 of the current Plan shall be deleted in its entirety and replaced with the following ACKNOWLEDGEMENT:

IRON WORKERS LOCAL NO. 5 TRUST FUND
ACKNOWLEDGEMENT OF PLAN PROVISIONS

I hereby acknowledge the subrogation provisions of the Iron Workers Local no. 5 Trust Fund. The rights of the Fund and the obligations of the injured party are set forth fully in the Iron Workers Local No. 5 Summary Plan Description but are summarized below:

1. The Fund will pay benefits in accordance with the Plan for covered medical expenses resulting from an illness or injury sustained by me which is caused directly

or indirectly by another party. I understand that medical benefits under the Plan will not be paid by the Fund until the liability of all potentially responsible third parties is determined. I understand that once the third party's liability is resolved, the Fund will pay medical expenses normally allowed under the Plan only to the extent monies have not been paid by the third party. The circumstances surrounding this illness or injury are described in the attached Information Sheet.

2. I acknowledge that under the terms of the Plan, the acceptance of benefits by me for an illness or injury caused directly or indirectly by another party constitutes an agreement by me to reimburse the Fund for benefits paid up to the full amount of any recovery due to the illness or injury. By accepting benefits from the Fund, I agree that any amounts recovered by judgment or settlement regardless of how the amounts recovered are characterized are Plan assets and will be applied to reimburse the Fund.

3. I acknowledge that under the terms of the Plan, the acceptance of benefits by me constitutes an agreement by me to notify the Fund promptly if suit is filed to recover amounts in connection with an illness or injury for which the Fund has paid benefits, or if I receive payment from any source for claims related to such illness or injury. By accepting payments from the Fund I agree that neither I nor anyone acting on my behalf will settle any claim relating to the illness or injury without the written consent of the Fund.

4. I acknowledge that under the terms of the Plan, if monies are recovered and the Fund is not reimbursed to the extent of its subrogation interest, the Fund may bring suit against me and/or any insurers and/or recipients of the Fund assets improperly distributed without the consent of the Fund. The Fund may also recover benefits

paid on my behalf in connection with such illness or injury by treating such benefits as an advance and deducting such amounts from Plan benefits which may become due to me or any member of my immediate family until the subrogation interest is recovered.

The Plan's right to seek reimbursement from me for payments it has made in connection with my illness or injury for which I recover from another party is governed solely by the provisions of the Plan itself and not by this acknowledgement

Name of Injured Party Signature

Date: _____

The GENERAL EXCLUSIONS at page 54 of the Plan shall be amended as follows:

(23) Medical expenses or charges for which a third party may be liable during the pendency of the resolution of the third party's liability.

(24) Medical expenses or charges for which a third party is liable to the extent the participant or dependent has received monies from a third party in connection with an accident or illness.

Adopted: May 19, 1992

Effective:

May 19, 1992

UNION TRUSTEES	EMPLOYER TRUSTEES
/s/ _____	/s/_____
/s/ _____	/s/_____
/s/ _____	/s/_____

Date 07-10-96

Participant's Name: Shawn B Paris SS# 218-15-2232

Address: 7810 Clark Rd D-73

Jessup Md 20794 Age 02-03-75

Patient: Shawn Date of Accident 06-25-96

Dear Member :

YOU RECENTLY FILED A CLAIM FOR MEDICAL BENEFITS ARISING FROM A NON-WORK RELATED ACCIDENT. IN ORDER TO PROPERLY PROCESS YOUR CLAIM, WE NEED THE FOLLOWING INFORMATION:

1. Give a full description of the accident and how you were involved: *The vehicle driven by Andrew Jaecks failed to yield the right of way when entering onto Quarterfield Road causing the motorcycle driven by Mr. Paris to collide into it.*
2. Give date, time and location of accident: *6/25/96 around 8 p.m. location was Quarterfield road near the entrance to the parking lot of the Chesapeake Medical Center in Anne Arundel County,*
3. Give the name and address of the other party involved in the accident: *Andrew Brenton Jaecks, 1646 Isabella Court, Millersville, Md 21108*
4. Give the other party's insurance company's name, address, telephone number, policy and claim number: *State Farm Mutual Insurance Company-policy*

#3117119C2320; claim #20-2966-439. telephone (301)622-7315.

5. Give the name of your insurance company: *State Farm Insurance Company policy #8024680-Fl-220.*

6. If you have engaged an attorney to represent you, please give his/her name, address and telephone number: *David M. Simpson and Donald P. Mclaughlin, 9111 Edmonston Road. Suite 402, Greenbelt, MD 20770 (301) 474-2814.*

SUBROGATION NOTICE

The Plan does not provide benefits to the extent of any recovery from a third party. The Health Fund is subrogated to the extent of any recovery that you obtain from third party if benefits have been previously paid by the Fund. If the Fund learns that there is a possibility of a complete recovery from a third party, you are required to complete the attached Assignment and Subrogation Agreement as a condition of the payment of the benefits.

FOR INSTANCE IF YOU ARE INJURED IN AN AUTOMOBILE ACCIDENT OR OTHER ACCIDENT FOR WHICH A THIRD PARTY IS LIABLE TO PAY YOU DAMAGE, THEN THE HEALTH FUND MAY DEDUCT FROM YOUR BENEFITS THE AMOUNT OF ANY RECOVERY FROM THE THIRD PARTY.

You are obligated to cooperate with the Fund in the enforcement of its subrogation rights. This means that you need to keep the Trust Fund Office informed of any accidents or illnesses for which you are claiming damages from a third party.

It is recognized that legal proceedings to recover from a third party can take a long time and are not always successful in the end. For this reason, the Fund will advance benefits on your behalf under a reimbursement/subrogation agreement. By signing this agreement, you agree that if you are successful in your claim against the third party, the Fund must be reimbursed.

Under the Fund's subrogation provision, you have the following obligations:

1. To show the Subrogation Agreement to your attorney if you retain an attorney to represent you in your claim. The attorney must sign the Subrogation Agreement or all benefit payments will cease.

2. Notify the Fund Office immediately if you file suit.
3. To take such action and cooperate with Plan representatives as necessary or appropriate to recover from any third party, as damages, those payments made by the Plan.
4. Any money recovered from third persons and paid by the Plan must be paid immediately to the Plan.
5. To not do anything to impair, prejudice, or discharge the Plan's right of subrogation.

Please contact the Fund Office it you have any questions about subrogation.

Assignment and Subrogation Agreement

This agreement is made between Shawn Robert Paris who shall be referred to in this Agreement as the "Claimant," and the Ironworkers Local No. 5 Trust Fund which as an Office at 6196 Oxon Hill Road, Suite 500, Oxon hill, Maryland 20745 and which shall be referred to in this Agreement as at the "Fund."

1. The Claimant asserts that the Fund is liable to Claimant pursuant to the provisions of the Health Plan for medical expenses incurred and/or weekly accident and sickness benefits paid following injuries sustained by the Claimant in an accident which occurred on June 25, 1996 in the County of Anne Arundel State of Maryland

2. The Claimant may make a settlement with or proceed in court against a third party or parties (who shall be referred to collectively as "Third Party") alleging that the injury was caused under circumstances which create a legal liability for the Third Party to pay damages to the Claimant.

3. The plan does not provide benefits for any injury to the extent of a recovery by Claimant from the Third Party or other person, firm, corporation or entity for claims arising from or related to the injury to Claimant which is referenced above.

4. The Claimant, in consideration for the payment by the Fund of medical benefits and/or weekly accident and sickness benefits arising from his or her injury which constitutes good, valuable and sufficient consideration, does hereby assign, transfer and subrogate to the Fund any and all sums of money received, now due and owing to him or her or later received from a Third Party or other person, firm, corporation or entity for which is referenced above.

Any sums recovered by the claimant from the Third Party or other person, firm, corporation or entity, either by judgment or settlement and regardless of whether such sums are designated as reimbursement for medical expenses incurred or anticipated or past or future wage losses as pain and suffering or as any other form of damages shall be applied first to reimburse the fund. Sums received by judgement or settlement in excess of the amount necessary to reimburse the Fund for all payments made or to be made in the future by the Fund relating to the injury to the Claimant may be retained by the Claimant as his sole property. The Fund shall not be responsible for any of the Claimant's attorney's fees or the costs of Claimant's litigation.

5. Notwithstanding any provisions of this Agreement to the contrary, it is understood and agreed that the Claimant will retain as his or her sole property any monies received or to be received by the Claimant from any source other than the Fund if such monies are received pursuant to a policy of insurance for which the Claimant or any member of the Claimant's immediate family has paid premiums. However, this shall not prevent coordination of medical benefits provided by the Fund with benefits provided by any other group health plan covering Claimant.

6. The Claimant authorizes the Fund to claim and receive any amounts hereby assigned, or to which the Fund is subrogated hereby, directly from any party liable to the Claimant and hereby directs such party to make such payment directly to the Fund upon presentation of a copy of this Agreement.

7. The Claimant agrees to notify the Fund promptly in writing if suit is filed by the Claimant or on Claimant's behalf against any Third Party or other

person, firm, corporation or entity. The Claimant also agrees to notify the Fund promptly if the Claimant receives any award as a result of litigation or if the Claimant receives payment from any source whatsoever for claims arising from or related to the injury to the Claimant except as provided in paragraph 5 of this Agreement.

8. The Claimant represents that no settlement has been made by the Claimant or on Claimant's behalf with or release given to any Third Party or other person, firm, corporation or entity against whom a claim may lie in connection with the injury to Claimant and that no such settlement will be made or release given by the Claimant or on Claimant's behalf without prior notice to and written consent from the Fund.

9. The Claimant agrees to notify the Fund of the name of any attorney retained by Claimant in connection with Claimant's injury and to notify the attorney of the requirements of this Agreement. In the event any attorney retained by Claimant refuses to execute the Statement By Claimant's Attorney which is part of this Agreement, the Fund will pay no further benefits until all of Claimant's claims in connection with the injury have been resolved and Claimant's recovery has been determined. At that time the Fund will pay benefits pursuant to the terms of the Plan to the extent that such benefits exceed Claimant's gross recovery , if any.

10. The Claimant agrees that if he or she fails to comply with any provision of this Agreement that the Claimant shall be responsible for any costs or attorneys' fees incurred by the Fund to enforce this agreement and further agrees to pay interest on any amounts owed to the Fund pursuant to this

Agreement at the rate set forth in Plan documents or, if no such rate is set forth, at the rate provided in Section 6621 of the Internal Revenue Code. Such interest shall be compounded annually. The Claimant also agrees that the Fund may collect amounts due to the Fund pursuant to this Agreement by offset against future benefits due to Claimant and that such offset may be lieu of or in addition to any court proceeding by the Fund.

11. If any paragraph, section or clause of this Agreement is held to be illegal by a court of competent jurisdiction, that part of the Agreement shall be without force or effect. All other provisions of this Agreement Shall remain in full force and effect.

Claimant's Name *Shawn Robert Paris*

Address *7810 Clark Rd D73 Jessup, Md 20794*

County of Residence

Telephone Number *(410) 596-0785*

Signature /s/ _____

(If Claimant is a minor this Agreement must be signed on Claimant's behalf by Claimant's parent or legal guardian)

Date *9/20/96*

Statement By Participant

(To be completed if the Claimant is someone other than the Participant).

I state that I am a Participant in the Ironworkers Local No. 5 Trust Fund and that the above named Claimant is eligible for benefits from the Plan as my dependent. I have read the Agreement between the Claimant and the Ironworkers Local No. 5 Trust Fund and consent to its terms.

I agree that if any amounts are recovered by or on behalf of Claimant that are required to be paid to the Fund pursuant to this agreement and such amounts are not paid to the Fund that the Fund may take action against me to collect the amounts recovered by or on behalf of the Claimant. The action by the Fund may include offsetting the amount due to the Fund against future benefits due to me and my dependents until the amount due to the Fund is repaid in full or taking legal action against me. I agree to pay any costs or attorneys' fees incurred by the Fund in its efforts to collect amounts due under this agreement from Claimant or from myself. I agree to pay interest on amounts owed to the Fund pursuant to this Agreement at the rate provided in Plan Documents or if no such rate is provided, at the rate provided in Section 6621 of the Internal Revenue Code. Interest shall be compounded annually.

Name of Participant *Shawn Robert Paris*

Address of Participant *7810 Clark Rd. D73, Jessup Md 20794*

Phone Number *(301) 596-0785*

Social Security Number of Participant *218-15-2232*

Signature of participant */s/ Wanda C. Paris*
as guardian of Shawn Paris

Date *9/20/96*

Statement by Attorney Representing Claimant

I acknowledge the terms of the Agreement between the Claimant and the Local No. 5 Iron Workers Trust Fund and agree to be bound by its terms in representing the Claimant in connection with any claim related to or arising out of the *injury which is the s*ubject of this Agreement

Attorney's Signature */s/ David M. Simpson*

Date *10/1/96*